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No. _____

In The

Supreme Court of the United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,

Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION,
JANE GARVEY, ADMINISTRATOR;
CITY OF KANSAS CITY, MISSOURI;
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the National Environmental Protection Act and supporting regulations and orders, the Federal Aviation Administration ("FAA") could not release Kansas City from its aeronautical obligations on Richards-Gebaur Memorial Airport for construction of a major rail-truck intermodal facility at the airport without an environmental assessment or impact statement, unless it found that the project was categorically excluded. Under environmental laws and the FAA's own published procedures, a categorical exclusion cannot be granted if there is one or more specified extraordinary circumstances present. Petitioners identified several extraordinary circumstances present in the Richards-Gebaur project, any one of which would have precluded a categorical exclusion. Was the FAA's decision granting a categorical exclusion arbitrary and capricious?

2. Was the FAA required to follow its own published standard procedures for granting categorical exclusions?

3. May an agency such as the FAA disregard the cumulative environmental impacts of a project when granting a categorical exclusion?

4. May an agency such as the FAA disregard the NEPA requirements to utilize an interdisciplinary approach when granting a categorical exclusion?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Friends of Richards-Gebaur Airport, Petitioner herein and Petitioner below; City of Grandview, Missouri, a municipal corporation, and a petitioner below; Federal Aviation Administration, Jane Garvey Administrator, Respondent herein and below; City of Kansas City, Missouri, an Intervenor on Appeal below; The Kansas City Southern Railway Company, an Intervenor on Appeal below; and the Aircraft Owners and Pilots Association, which filed an Amicus Brief on behalf of Petitioner in the Court of Appeals.

Additionally, a companion case, *Aircraft Owners and Pilots Association, Petitioner v. Federal Aviation Administration, Jane Garvey, Administrator, United States Department of Transportation, Rodney E. Slater, Secretary, Respondent, The Kansas City Southern Railway Company; and the City of Kansas City, Missouri, Intervenors on Appeal,* Case No. 00-1974, was consolidated with *Friends of Richards-Gebaur Airport, et al. v. Federal Aviation Administration, et al.,* in the case below.

Petitioner, Friends of Richards-Gebaur Airport, is a not-for-profit corporation made up of members affected by the FAA's actions. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Friends of Richards-Gebaur Airport, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Federal Aviation Administration Order that is the subject of this matter, was issued December 23, 1999, and is entitled: *Categorical Exclusion Evaluation and Determination for the Federal Release of the City of Kansas City, Missouri, from its obligations to maintain aeronautical use of approximately 497 acres of the existing Richards-Gebaur Airport, Kansas City, Missouri,* and is reprinted in the Appendix to this Petition. Pet.App. at 36.

The Eighth Circuit decision upholding the FAA Order granting the categorical exclusion is reported at 251 F.3d 1178 (8th Cir. 2001) and is reprinted in Pet.App. at 1.

JURISDICTION

The Federal Aviation Administration (FAA) issued the Orders which are the subject of this Petition on December 23, 1999, pursuant to 49 U.S.C. § 40101 *et seq.* and 49 U.S.C. § 47101. These Orders were subject to review by the Court of Appeals of the United States in accordance with 49 U.S.C. § 46110. Petitioners timely filed their Petition for Review on March 6, 2000. On June 11,

2000, the Court of Appeals affirmed the Federal Aviation Administration Orders. On July 25, 2001, Petitioners filed a Petition for Rehearing and Rehearing en banc, which was denied on September 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Since the United States is a party, this petition is timely filed pursuant to Supreme Court Rule 13(1).

STATUTES, REGULATIONS AND ADMINISTRATIVE ORDERS

42 U.S.C. § 4332.

> § 4332. Cooperation of agencies: . . .
>
> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall –
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment.

42 U.S.C. § 4342

> There is created in the Executive Office of the President a Council on Environmental Quality. . . .

40 C.F.R. § 1507.2

> § 1507.2 Agency capability to comply.
>
> . . . Agencies shall:

(a) Fulfill the requirements of sec. 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on the human environment.

§ 1507.3 Agency procedures

(a). . . . each agency shall consult with the Council while developing its procedures and before publishing them in the Federal Register for comment. . . . The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. . . .

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

. . .

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

40 C.F.R. § 1508.4

§ 1508.4 Categorical exclusion.

"Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by the Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. § 1508.7

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

49 C.F.R. § 1105.6, Title 49 – Transportation

(a) Environmental Impact Statements will normally be prepared for rail construction proposals other than those described in paragraph (b)(1) of this section;

(b) Environmental Assessments will normally be prepared for the following proposed actions;

(1) Construction of connecting track within existing rail rights-of-way, or on land owned by the connecting railroads;

FAA Order 1050.1D.

. . .

4. . . .

f. . . . the Office of Airport Planning and Programming has its own environmental handbook, Order 5050.A, which is consistent with Federal environmental procedures contained in this order. . . .

. . .

32. EXTRAORDINARY CIRCUMSTANCES. Proposed Federal actions, normally categorically excluded, which have any of the following characteristics shall be the subject of an environmental assessment.

. . .

b. An action that is likely to be highly controversial on environmental grounds.

. . .

f. An action that is likely to:

. . .

(2) Have a significant impact on air quality or violate the local, state, or Federal standards for air quality.

. . .

(4) Be inconsistent with any Federal, State, or local law or administrative determination relating to the environment.

FAA Order 5050.4A.

> 24. Extraordinary Circumstances. Proposed Federal actions which are normally categorically excluded but which have any of the following characteristics shall be the subject of an environmental assessment.
>
> . . .
>
> b. An action that is likely to be highly controversial on environmental grounds. A proposed Federal action is considered highly controversial when the action is opposed on environmental grounds by a Federal, state, or local government agency . . .
>
> . . .
>
> f. An action that is likely to:
>
> . . . .
>
> (2) Have a significant impact on air quality or violate the local, state, or Federal standards for air quality.
>
> . . .
>
> (4) Be inconsistent with any Federal, state, or local law, or administrative determination relating to the environment.

10 Mo.Code State Regs. (C.S.R.). 10-6.020. Definitions and Common Reference Tables.

> (1) Application. This rule shall apply throughout Missouri defining terms and expressions used in all Title 10. Division 10 – Air Conservation Commission rules.

(2) Definitions.

. . .

(10) Significant – A net emissions increase or potential to emit at a rate equal to or exceeding the de minimis levels . . .

(3) Common Reference Tables.

(A) Table 1 – De minimis Emissions Levels.

Air Contaminant	Emission Rate
Carbon monoxide	100.0

. . .

Note: All rates are in tons per year.

STATEMENT OF THE CASE

Introduction

The United States transferred to Kansas City, Missouri its interest in Richards-Gebaur Memorial Airport. Kansas City was obligated to use the airport property for aeronautical purposes unless released from those obligations by the Federal Aviation Administration. Kansas City sought to use the property for a truck and rail intermodal facility to be built by Kansas City Southern Railroad. Based upon environmental documents provided by the intermodal project proponent Kansas City Southern Railroad, the Federal Aviation Administration released Kansas City from its aeronautical obligations in December 1999, finding that the release for the intermodal project was categorically excluded from an environmental assessment or an environmental impact statement. In making

this release, the Federal Aviation Administration relied upon its "Airport Environmental Handbook" (FAA Order 5050.4A) published in support of and in compliance with Policies and Procedures for Considering Environmental Impacts, FAA Order 1010.1D. The Federal Aviation Administration found that there were no extraordinary circumstances present that would preclude the granting of a categorical exclusion.

Petitioner identified several factors that constituted extraordinary circumstances under the FAA Orders 1050.1D and 5050.4A, any one of which alone would preclude the granting of a categorical exclusion under the Federal Aviation's orders. Pursuant to 49 U.S.C. § 46110, Petitioner sought review in the United States Court of Appeals for the Eighth Circuit. In the initial brief, Petitioner, through its expert witness, identified an error in the environmental reports, underestimating the air pollution effects of the truck and rail intermodal project by a factor of over 300 times. Respondent FAA was permitted to correct this error during the pendency of the proceeding below. The corrected air pollution effects still exceed the State of Missouri's level required for significance. Nevertheless, the FAA still maintained that the effects would not be significant.

In upholding the FAA's grant of the categorical exclusion, the Eighth Circuit Court of Appeals' decision, citing *Christensen v. Harris County*, 529 U.S. 576 (2000), held that the FAA Order 5050.4A was not binding upon the Agency, because the order did not contain agency rulings from adjudicatory proceedings or formal rule making and that it was only to be accorded respect by the Court to the extent the orders had power to persuade. This decision

by the Eighth Circuit conflicts with the Seventh Circuit Court of Appeals decision in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), wherein the court found that an agency was bound by the provisions of its Environmental Handbook.

After the Eighth Circuit's decision, this Court issued its decision in *United States v. Mead Corporation*, 533 U.S. 218 (2001), that expressed a more expansive view of which agency orders are entitled to *Chevron* deference. *See: Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 767 U.S. 873 (1998). The Petitioner then sought rehearing from the Eighth Circuit. The Petition for Rehearing was denied.

When the FAA granted the categorical exclusion, it also failed to properly consider the cumulative impacts of the project and to use an interdisciplinary approach. This is contrary to 42 U.S.C. § 4332 and regulations of the Council for Environmental Quality. If these provisions had been followed, a categorical exclusion could not have been granted.

It is a major question of Federal environmental law whether or not agencies must use an interdisciplinary approach and consider cumulative impacts when considering categorical exclusions. Such agencies should not be free to ignore or evade the statutory and regulatory requirements relating to cumulative effects and an interdisciplinary approach in finding projects categorically excluded.

Statutory And Regulatory Background

Under the National Environmental Policy Act (NEPA), all agencies of the federal government are required to use a systematic interdisciplinary approach in planning and decisionmaking. 42 U.S.C. § 4332. NEPA created the Council for Environmental Quality (CEQ), which promulgates regulations implementing NEPA. 42 U.S.C. § 4342. These regulations require all federal agencies to adopt implementing procedures, 40 C.F.R. § 1507.3, and to use a systematic interdisciplinary approach. 40 C.F.R. § 1507.2. These regulations also require the agencies to set forth provisions for categorical exclusions for actions that individually or cumulatively do not have a significant effect on the environment, and extraordinary circumstances in those instances when a normally excluded action may have a significant environmental effect. *Id.* at 40 C.F.R. § 1508.4.

CEQ required each agency to develop procedures that were to be published in the Federal Register for comment. 40 C.F.R. § 1507.3(a). CEQ further required that these procedures include provisions for categorical exclusions. *Id.* at (b).

The Federal Aviation Administration issued Order 1050.1D to establish "Federal Aviation Administration (FAA) policies and procedures for the preparation of Environmental Impact Statements (EISs) and Findings of No Significant Impact (FONSIs) and for preparing and processing environmental assessments of FAA actions. Order 1050.1D also set forth categorical exclusions and extraordinary circumstances in Chapter 3, ¶¶ 31-32. FAA Order 1050.1D. FAA Order 5050.4 is the Environmental

Handbook of the Federal Aviation Office of Airport Planning and Programming and "is consistent with Federal Environmental Procedures contained in [Order 1050.1D]." *See* 1050.1D at ¶ 4.f. Order 5050.4A contains the same categorical exclusions and extraordinary circumstances as does Order 1050.1D. Changes to Order 1050.1 are published in the Federal Register for public comment and review.

Missouri Regulation 10 C.S.R. 6.020(2) states that a net emissions increase or potential to emit at a rate equal to or exceeding the *de minimis* levels is significant. 10 C.S.R. 10-6.020(2). Table 1 of 10 C.S.R. 10-6.20(3)(A) sets the de minimis levels for carbon monoxide at 100 tons per year.

Factual Background

On August 21, 1985, under the Surplus Property Act of 1944, the United States of America released and transferred to the City of Kansas City, its interest in Richards-Gebaur Memorial Airport. By accepting the Richards-Gebaur Airport and Federal funds over the years, Kansas City assumed obligations to use the airport for aeronautical purposes. See Pet. App. at 3.

Kansas City requested release from its federal obligations on Richards-Gebaur Airport so it could transfer the airport to the Kansas City Southern Railroad Company for construction and operation of a truck-rail intermodal facility by Kansas City Southern Railroad Company. On October 22, 1999, Kansas City submitted an environmental document prepared by the Railroad's contractor, TranSystems, for the FAA to document a categorical

exclusion. On December 3, 1999, Kansas City submitted additional documentation requested by the FAA.

On December 20, 1999, the FAA was advised by e-mail that the neighboring cities of Belton and Grandview objected to the intermodal project on environmental grounds. On December 21, 1999, the Kansas City Aviation Department submitted a letter to the FAA requesting immediate release of its obligations on the Richards-Gebaur Memorial Airport property. By a letter dated December 22, 1999, City of Grandview Mayor Wilson notified the FAA of Grandview's continuing environmental objections to the intermodal facility. The FAA Order finding a categorical exclusion and releasing Kansas City from its aeronautical obligations was issued on December 23, 1999.

Decision of the Court of Appeals

The Court of Appeals found that, although the FAA had, consistent with CEQ regulations, promulgated a list of categorical exclusions and characteristics amounting to extraordinary circumstances consistent with CEQ regulations, in the form of FAA Order 5050.4A, the Order did not contain agency rulings resulting from adjudicatory adversary proceedings or formal rule making. Therefore, according to the Court, the FAA order was not entitled to *Chevron*-style deference. The court then went on to find that there were no extraordinary circumstances, in spite of several instances when extraordinary circumstances were clearly present under the plain language of FAA Order 5050.4A.

In addition, although the truck-rail intermodal project will involve the construction of four railroad tracks within the airport property, as well as up to nine additional future tracks, the Court of Appeals found that the FAA did not categorically exclude the construction of railroad tracks, and that the issue relating to the construction of railroad track was not properly before the Court. This is in direct contravention to the NEPA statute and regulations which require that cumulative impacts be considered when granting categorical exclusions and that the agencies use interdisciplinary approaches in making environmental decisions.

ARGUMENT

Deference To Be Given to FAA Orders 1050.1D and 5050.4

The improper use of categorical exclusions permits a major agency decision, that might affect the environment in a significant manner, to escape proper review. In response to CEQ regulations, agencies have set up their own internal regulatory provisions to permit the granting of categorical exclusions, together with a safeguard to identify those projects which involve extraordinary circumstances, and which would preclude the granting of a categorical exclusion. 40 C.F.R. § 1507.3. The existence of these pre-existing procedures helps to ensure that federal projects affecting the environment do not escape proper review. The application of these pre-established administrative procedures by each of the agencies is necessary to

ensure consistency in the application of NEPA and prevent arbitrary decision making by agencies.

The Federal Aviation Administration procedures established pursuant to 40 C.F.R. § 1507.3 include the categorical exclusions and are contained in FAA Order 1050.1D and FAA Order 5050.4.

In this instance at bar, there were obvious specific factors constituting extraordinary circumstances, militating against use of the categorical exclusion. The most significant examples were air quality and local government opposition, which were essentially ignored by the FAA and by the United States Court of Appeals for Eighth Circuit. Both found that there was not a significant impact on the environment on these matters, although such findings clearly violated the terms of FAA Orders 1050.1D and 5050.4. Had the FAA and the Eighth Circuit Court of Appeals followed the Federal Aviation Administration Environmental Handbook and Orders, the categorical exclusion would not have been granted, since there would have been a finding of an extraordinary circumstance with respect to air quality, and local controversy.

Air Quality

On April 10, 2000, after Petitioner had filed the Petition for Review, the FAA supplemented its documentation relating to air pollution to correct a mathematical miscalculation in its original analysis. The FAA learned of this initial error, which underestimated the pollution by a factor of 300, from an expert witness for Petitioner who had identified the error. After this error was corrected,

the FAA still acknowledged that carbon monoxide (CO) resulting from the proposed intermodal facility in the year 2018 would be 129 tons per year. See Declaration of Ed Melisky. Petition App. at 52. This level by definition violates state standards for air quality, whereby any CO emissions over 100 tons per year are significant. This undisputed fact alone constitutes an extraordinary circumstance precluding a categorical exclusion.

Pursuant to FAA Order 1050.1D ¶ 32.(f)2 and Order 5050.4A ¶ 24f(2), federal actions normally categorically excluded which have a *significant impact on air quality or violate local, state or federal standards for air quality* shall be the subject of an environmental assessment. It is also an extraordinary circumstance precluding a categorical exclusion if the proposed action is "inconsistent with any Federal, *State,* or Local law or administrative determination relating to the environment." Order 1050.1D ¶ 32(f)4; and Order 5050.4A at ¶ 24f(4). Missouri Regulation 10 C.S.R. 10-6.020(2) states that an emission equal to or exceeding the de minimis level, 100 tons per year for CO (Table 1, 10 C.S.R. 10.6.020(3)) *is significant*. The CO level accepted by the FAA is 129% of this level.

The Eighth Circuit did not even address this issue, other than to repeat the FAA's assertion that the air quality effects do not rise to a significant level. That is directly contrary to Missouri regulations which, under Orders 1050.1D and 5050.4A, must be considered. If the FAA environmental Orders 1050.1D and 5050.4A, had been followed by the FAA, this extraordinary circumstance would have been properly identified and a categorical exclusion would not have been granted. Similarly, had the Court of Appeals given the FAA environmental

orders the deference to which they were entitled by *Mead*, the FAA's finding of a categorical exclusion would not have been upheld.

Objection by Grandview

The FAA ignored a letter by the Mayor of the City of Grandview challenging the action on environmental grounds. The Court of Appeals also rejected this letter from Grandview as being "too little and far too late". Pet. App. at 13. Under the FAA Environmental Handbook, Order 5050.4A, a categorical exclusion cannot be granted when the action opposed on environmental grounds is likely to be highly controversial. "A proposed Federal action is considered highly controversial when the action is opposed on environmental grounds by a . . . local government agency." FAA Order 5050.4 ¶ 24b. The FAA Order does not specify a time limit in which the objection by the local government must be put forth. The FAA was aware of Grandview's objection before it issued the categorical exclusion. Thus, under the plain language of the FAA Order, a categorical exclusion cannot be granted. See: *Rhodes v. Johnson*, 153 F.3d 785, 790 (7th Cir. 1998).

Furthermore, in asserting that Grandview's objection was too late, the Eighth Circuit noted that a public proceeding had been ongoing for approximately two years. Pet. App. at 13. This proceeding, however, was not an officially noticed proceeding. Any hearings that were held were *ad hoc* meetings held by the project proponents and their attorneys. Pet. App. at 40-41. The environmental reports used to support the airport transfer and intermodal project were not submitted until October 22, 1999.

They were only made available to the Petitioners as a result of a Freedom of Information Act request. Therefore, Grandview did not delay in submitting its objection in December, 1999. As with the air quality issue, had the FAA environmental orders been given proper deference, a categorical exclusion would not have applied. Pet. App. at 5.

In finding that air quality and this objection by the City of Grandview were not extraordinary circumstances and that they did not have a significant effect, the Eighth Circuit stated that the FAA Environmental Handbook, Order 5050.401A was not entitled to *Chevron* deference, but was only entitled to respect from the Court to the extent it had the power to persuade. Pet. App. at 29. In reaching this conclusion, the Eighth Circuit relied upon this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). The Eighth Circuit found that, since the Order did not contain agency rulings as the result of adjudicatory adversary proceedings or formal rule making, it was not entitled to *Chevron*-style deference. Pet. App. at 10.

After the decision in this matter by the Eighth Circuit, but before denial of Petitioner's Petition for Rehearing, this Court entered its decision in *United States v. Mead Corporation*, 533 U.S. 218, 121 S.Ct. 2164 (2001). In *Mead*, this Court held that:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency

> interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice and comment rule making or by some other indication of comparable congressional intent. *Id.* at ___, 2171.

In this instance, Congress required that federal agencies develop procedures and methods in consultation with CEQ to implement the congressional plan under NEPA, 42 U.S.C. § 4332. Further, CEQ regulations require each agency to consult with CEQ in developing its procedures, and to publish its procedures for public comment in the Federal Register. 40 C.F.R. § 15.07.3(a). Clearly, in this instance, the criteria enunciated in *Mead* for *Chevron* deference are present. Thus, pursuant to this Court's pronouncements in *Mead*, the FAA's Environmental Orders 5050.4A and 1050.1D are to be given *Chevron* deference.

Had these Orders been properly followed by the FAA and by the Court of Appeals, by applying *Chevron* deference, a categorical exclusion would not have been permissible in this matter.

The Seventh Circuit was faced with a similar situation involving the U.S. Forest Services Environmental Handbook in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998). In *Rhodes*, there were two extraordinary circumstances present that might have had a significant environmental effect. Under the Forest Service's interpretation, once it had concluded, after an internal review, that the extraordinary circumstance would not have a significant impact on the environment, it contended that it did not

have to prepare any further environmental studies. *Id.* at 789. In ruling against the Forest Service, the *Rhodes* court stated:

> We conclude that the presence of an extraordinary circumstance requires the Forest Service to prepare an environmental assessment. *This is compelled by the plain language of the Environmental Handbook.* The flow chart unambiguously sets out two possible paths when a categorical exclusion applies: Either the proposed actions 'has no extraordinary circumstances' and so no further analysis is required, or it has extraordinary circumstances in which an environmental assessment is required. *Id.* at 789. [emphasis added].
>
> . . . .
>
> It is not enough that the Forest Service has conducted an internal review to determine whether the extraordinary circumstance will cause the proposed action to have a significant impact on the environment. An environmental assessment is a process required to make that interpretation. *Id.* at 789.

Had the Eighth Circuit ruled consistently with the Seventh Circuit, the FAA's granting of a categorical exclusion would have been reversed.

If the agencies are permitted to deviate from their environmental orders that were published under the requirements of NEPA and CEQ regulations, then the integrity of the NEPA procedures will be lost. Further, meaningful judicial review would be impossible. Once the agencies publish their orders with their procedures, they must be followed until properly amended.

Otherwise, categorical exclusions could make NEPA programs ineffective.

Cumulative Effects and Interdisciplinary Approach

Although an agency is required to consider cumulative effects of a proposed action, and to use an interdisciplinary approach, the FAA did not consider the effect of the railroad's participation, and the FAA did not address or consider the appropriate regulations requiring consideration of cumulative effects and use of an interdisciplinary approach which it was required to consider. 40 C.F.R. §§ 1507.2, 1508.4, and 1508.7, and 49 C.F.R. § 1105.6. Had these regulations been properly applied, a categorical exclusion could not have been granted.

The intermodal project will involve the construction of four (4) intermodal tracks within the airport property, as well as up to nine (9) additional future tracks. Also, an automobile loading facility with its own separate tracks was to be constructed. There was also a proposed realignment of main track that would take it outside of the railroad's right of way and onto the airport property. Passing and siding tracks are also proposed. The purpose of all this track was to serve an area which has not previously been served by the railroad. Before now, there was only one track in which the railroad passed through the area. Since additional track will be added within the airport land area, *which is not within the existing railroad right of ways,* a full environmental impact statement is required. 49 C.F.R. § 1105.6(a)(b).

The FAA contended that it did not categorically exclude the construction of the railroad track. The court

agreed with the FAA that the issue relating to the railroad track construction was not a question properly before the Court of Appeals at this time. Pet. App. at 25. The cumulative effects of the railroad construction should have been considered using the regulations applicable to railroad projects. If they had, the project would not have been categorically excluded.

This position taken by the FAA and the Court of Appeals is directly contrary to the requirements of 42 U.S.C. § 4332(a) and CEQ regulations 40 C.F.R. § 1508.7, 40 C.F.R. § 1507.2(a). The definition of categorical exclusion is a "category of action which do not individually or *cumulatively* have a significant effect on the human environment." 40 C.F.R. § 15.04. [emphasis added]. The approach taken by the FAA and the Court is a classic case of segmentation contrary to NEPA. Congress instructed agencies not to selectively ignore the cumulative effects of a project based on agency jurisdiction. This is directly contrary to 42 U.S.C. § 4332.

NEED FOR WRIT OF CERTIORARI

In reaching this decision in the underlying case, the United States Court of Appeals for the Eighth Circuit entered a decision directly in conflict with the United States Court of Appeals for the Seventh Circuit, with respect to the deference to be given to agency procedures established pursuant to NEPA. This is an important matter which directly affects the proper and effective administration of national environmental policy and executive implementation of congressional intent. This issue also

affects the general application of many administration orders and procedures.

The United States Court of Appeals for the Eighth Circuit has also effectively decided that when reviewing and granting categorical exclusions, the agency need not consider cumulative impacts or use an interdisciplinary approach. This is contrary to 42 U.S.C. § 4332 and CEQ regulations. It is an important matter of federal law which should be decided by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1050

Friends of Richards-Gebaur Airport; City of Grandview, Missouri, a Municipal corporation, Petitioners, v. Federal Aviation Administration, Jane Garvey, Administrator, Respondent. City of Kansas City, Missouri; The Kansas Southern Railway Company, Intervenors on Appeal.	*	Petitions for Review of an Order of the Federal Aviation Administration.
Aircraft Owners and Pilots Association, Amicus on Behalf of Petitioner.	*	

No. 00-1974

Aircraft Owners and Pilots Association,

Petitioner,

v.

Federal Aviation Administration, Jane Garvey, Administrator; United States Department of Transportation, Rodney E. Slater, Secretary,

Respondents.

The Kansas City Southern Railway Company; City of Kansas City, Missouri,

Intervenors on Appeal.

Submitted: June 13, 2000
Filed: June 11, 2001

Before LOKEN, BRIGHT, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

The Friends of Richards-Gebaur Airport (Friends) and the City of Grandview, Missouri (Grandview), filed a

petition for judicial review of an order of the Federal Aviation Administration (FAA) releasing airport property, challenging the order on environmental grounds. Consolidated with their petition is the separate petition of the Aircraft Owners and Pilots Association, challenging the FAA's statutory authority to make the release. After carefully considering the administrative record, we deny both petitions for review and affirm the order of the FAA.

I.

The Richards-Gebaur Airport was built in 1941 on land owned by the City of Kansas City, Missouri (city). In 1955, the city deeded the property free of charge to the United States Air Force for use as a permanent military base. The Air Force deactivated the base in 1976, declaring approximately 1,362 acres as surplus property. Since then, it has been a public use general aviation airport primarily serving small privately owned aircraft. In August 1985, the United States conveyed the property back to Kansas City, pursuant to the Surplus Property Act, *see* 49 U.S.C. § 47151 (1994). This conveyance required the city to use the property as a public use airport. Between 1986 and 1994, the city had accepted approximately $12.2 million in federal Airport Improvement Program funds for airport development, and each grant required the city to give written assurances that the airport would be available to the public for aeronautical use.

For several years, the Richards-Gebaur Airport had consistently lost money. Between 1983 and 1997, losses

exceeded $18 million and were subsidized by the city's two commercial airports. The airport's losses were projected to continue at more than $1.5 million annually. In 1997, in an effort to pursue an opportunity to redevelop the land into a new intermodal rail-truck freight distribution center,[1] Kansas City submitted an application to the FAA requesting permission to close the airport and seeking to be released from its federal obligations and assurances to maintain the property for public aeronautical use under the Surplus Property Act and the Airport Improvement Program.

The FAA and Kansas City negotiated a memorandum agreement dated July 1998, in which the FAA concluded that the terms it attached to the release and closure of the airport would result in a net benefit to aviation. The FAA found that although the facility was maintaining operation as a general aviation airport, it was able to do so only at substantial losses which were heavily subsidized by Kansas City's other commercial airports, draining funds otherwise available to those facilities. The FAA found that this financial burden was not necessary in a metropolitan area served by several other airports that remain available to general aviation. The memorandum agreement required Kansas City to deposit $5 million into an escrow account to be dispersed by the FAA for federally

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[1] "It is a goal of the United States to develop a national intermodal transportation system that transports passengers and property in an efficient manner." 49 U.S.C. § 47101(b) (1994). "A national intermodal transportation system is a coordinated, flexible network of diverse but complementary forms of transportation that transports passengers and property in the most efficient manner." *Id.* § 47101(b)(3).

eligible aviation improvement projects in the Kansas City area.[2] The city also agreed that for 20 years, it would deposit all net proceeds from the projected lease of the property into its aviation account for use solely for specified and general aviation projects. It agreed to notify the FAA of each disbursement from the net proceeds account and to permit the FAA to audit the account.

On February 22, 1999, the Kansas City City Council by ordinance approved a 50-year lease for development of the facility by the Kansas City Southern Railway Company (KCSR). The voters of Kansas City approved the ordinance in a referendum vote on August 3, 1999. On October 22, 1999, Kansas City submitted an Environmental Documentation Report, supported by exhibits, demonstrating that the development does not present any extraordinary circumstances that would require further environmental assessment.

In a letter dated December 23, 1999, the FAA released Kansas City from its federal obligations to maintain the property as an airport, allowing the city to close the airport and maintain the property as nonaeronautical,

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[2] An amended memorandum of agreement was negotiated on March 20, 2000, to respond to the possibility that Kansas City would build (within five years) a replacement general aviation airport on the site. Other provisions of the agreement, however, remain identical to the first negotiated agreement, except that the release was modified to release initially only two parcels of land totaling 497 acres of the entire 1,362- acre property from the obligation to continue to use them for airport use. Those two parcels consisted of the existing airfield itself and related property which would, in turn, be used for the planned intermodal facility.

revenue-producing property of the Kansas City Aviation Department consistent with the memorandum of agreement. The FAA prepared no formal environmental analysis of this proposed action but considered several pertinent environmental factors before concluding that the closure was categorically excluded from the requirement of preparing an environmental assessment. The FAA issued its categorical exclusion evaluation on the same date as the letter releasing the airport property.

The record indicates that the public had an opportunity to participate in and comment on the proposed redevelopment throughout the more than two years in which the application was pending before the FAA. Thirty-five public meetings were held in a variety of locations in addition to open public meetings before the Kansas City City Council. Four of the public meetings were held in the neighboring City of Grandview, and there was substantial media coverage of the proposed redevelopment. A small number of citizens wrote letters opposing the project on a variety of grounds, and a group of pilots formed the opposition group known as the Friends of Richards-Gebaur Airport. On the very afternoon that the FAA issued its release, the FAA received a faxed letter from the Mayor of Grandview expressing opposition to the release on environmental grounds, but this was the only opposition from any governmental agency throughout the two-year application process.

Pursuant to 49 U.S.C. § 46110 (1994), the Friends and Grandview filed in this court a petition for judicial review of the FAA's action, challenging the FAA's decision to categorically exclude the closure of this airport from the requirement of preparing an environmental

assessment. The Aircraft Owners and Pilots Association also petitioned for judicial review, asserting that the FAA failed to satisfy the standards of the Surplus Property Act and lacked authority to release Kansas City from its federal obligations. We consolidated these petitions for purposes of briefing and argument, and permitted Kansas City and the Kansas City Southern Railway Company to intervene in support of the FAA's decision.

II.

A court of appeals reviewing a petition for judicial review of an order of the FAA "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. § 46110(c). In reviewing an order under this section, the court may consider only those objections made in the agency proceeding, unless there was a reasonable basis for not making the objection earlier. *See id.* § 46110(d). The statute mandates that the agency's findings of fact are conclusive as long as they are supported by substantial evidence. *See id.* § 46110(c). Because § 46110 does not specifically enunciate a standard for reviewing the FAA's nonfactual determinations, we turn to the Administrative Procedure Act (APA) for the appropriate standard. *See* 5 U.S.C. § 706. The APA prescribes that an agency action is unlawful and may be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). In sum, while our factual inquiry on the record must be "searching and careful," our scope of review is quite narrow; we are "not empowered to substitute [our own] judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). We

determine merely " 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Downer v. U.S. by and Through U.S. Dep't of Agric. and Soil Conservation*, 97 F.3d 999, 1002 (8th Cir. 1996) (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)).

The petitioners essentially challenge two agency decisions. First, they challenge the FAA's decision to categorically exclude the proposal to close the airport from the requirement of preparing an environmental assessment under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d (1994). Second, they challenge the FAA's decision to grant Kansas City a release from its federal obligations to maintain the property as an airport.

A. Categorical Exclusion

We begin with the environmental challenge. The Friends and Grandview contend that the FAA abused its discretion by not taking a hard look at the environmental impact of its decision as required by NEPA. *See* 42 U.S.C. § 4332(2). NEPA requires federal agencies taking major federal actions that significantly affect the quality of the human environment to prepare a detailed environmental impact statement considering the effects of and alternatives to the proposed action. *See id.* § 4332(2)(C). The environmental impact statement requirement ensures that agencies "take a 'hard look' at the environmental consequences of a project before taking a major action." *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999) (internal quotations omitted).

NEPA's Council on Environmental Quality (CEQ) has promulgated regulations to provide federal agencies with guidance for complying with NEPA's requirements. *See* 40 C.F.R. §§ 1500-1517. The regulations encourage agencies to document an environmental assessment, briefly providing the agency with sufficient evidence to determine whether the proposed agency action has no significant impact on the environment or whether the action has a significant impact that requires the preparation of a detailed environmental impact statement under NEPA. *See* 40 C.F.R. § 1508.9. The regulations also provide that agencies may categorically exclude certain types of federal activities from this case-by-case environmental assessment review. *See id.* § 1500.4(p) (requiring agencies to reduce paperwork in part by using categorical exclusions to define categories of actions that do not have a significant impact on the environment and are therefore exempt from NEPA's requirement to prepare an environmental impact statement); § 1507.3(b)(2)(ii) (requiring agencies to develop specific criteria for identifying categorical exclusions).

The CEQ regulations define categorical exclusions as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." *Id.* § 1508.4. For actions falling within a categorical exclusion, neither an environmental assessment nor an environmental impact statement is required. *See id.* The regulations require that an agency must also consider exceptions to the categorical exclusions by listing "extraordinary circumstances in

which a normally excluded action may have a significant environmental effect," thus requiring the preparation of an environmental assessment. *Id.*

Consistent with these CEQ regulations, the FAA promulgated a list of categorical exclusions and characteristics amounting to extraordinary circumstances, which are set forth in the Airport Environmental Handbook, FAA Order 5050.4A. (*See* Petitioners' App. at 900-903.) The federal release of airport land is listed in the Handbook as an action that is categorically excluded from the requirement of preparing a formal environmental assessment. (*See id.* at 901; FAA Order 5050.4A, ¶ 23(10).) Relevant factors listed as extraordinary circumstances include any action that is likely to (1) have an effect on property protected under the Historic Preservation Act, (2) be highly controversial on environmental grounds, (3) be highly controversial with respect to the availability of relocation housing, (4) cause a significant increase in surface congestion, or (5) have a significant impact on noise levels or air quality. (Petitioners' App. at 902; FAA Order 5050.4A, ¶ 24.) FAA Order 5050.4A is an interpretive agency order. Because it does not contain agency rulings reached as a result of adjudicatory adversary proceedings or formal rule making, it is not entitled to *Chevron*-type deference, but the order is nevertheless accorded respect by the courts to the extent it has the power to persuade. *See Christensen v. Harris County*, 120 S.Ct. 1655, 1662-63 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *see also Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986) (stating that interpretive rules provide guidance to parties and "carry no more weight on judicial review than their inherent persuasiveness

commands") (internal quotations omitted). The FAA's Airport Environmental Handbook, "while not controlling upon the courts by reason of [its] authority, do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140.

The petitioners do not argue that the federal release of airport land is an action that cannot be categorically excluded from the environmental assessment requirement, and we have no reason to doubt the agency's informed decision in this matter. Instead, they contend that the FAA failed to adequately consider all of the relevant extraordinary circumstances that would prevent the use of the categorical exclusion in this particular case.

The FAA documented its categorical exclusion evaluation in this case in which it considered and discussed the relevant extraordinary circumstances listed in FAA Order 5050.4A. Specifically, the FAA considered the effect of the proposed action on property subject to the National Historic Preservation Act, the potential noise, air quality, and water quality consequences of the action, its effect on farmlands, whether the action was highly controversial on environmental grounds, its effect on the natural environment, the availability of relocation housing, the potential community disruption, the cumulative impact of the action (including the project's effect on air quality and surface traffic congestion), and other relevant aspects likely to be at issue with this project. The FAA concluded that based upon its evaluation of the likely impacts of the proposed action, no extraordinary circumstances existed to preclude a categorical exclusion of this

action from the environmental assessment requirement. (*See* Petitioners' App. at 31.)

We review an agency's determination that an action falls within a categorical exclusion under the arbitrary and capricious standard. *See Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999). The Friends and Grandview contend that the FAA acted arbitrarily and capriciously in determining the categorical exclusion applied, asserting that several extraordinary circumstances required the FAA to take a closer look by completing an environmental assessment. We consider each challenged extraordinary circumstance in turn.[3]

1. Highly Controversial on Environmental Grounds

The petitioners assert that the release of airport property was highly controversial on environmental grounds. The FAA's order states that a proposed action is highly controversial on environmental grounds (thus requiring the preparation of an environmental assessment) when the action is opposed on environmental grounds by a

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[3] We do not reach the petitioners' allegations that the FAA's decision to release the property was preordained and the outcome predetermined. Our review of the extra-record affidavits relied on by the petitioners in an attempt to prove bad faith or improper motives on the part of the FAA convinces us that they do not rise to the level of the " 'strong showing of bad faith or improper behavior' " which would permit us to look behind the decision and overcome the presumption of regularity accorded agency action. *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (quoting *Overton Park*, 401 U.S. at 420).

government agency or a substantial number of the persons affected by the action. (*See* Petitioners' App. at 902; FAA Order 5050.4A, ¶ 24(b).) The FAA found no significant environmental opposition.

The petitioners assert that the FAA completely ignored the faxed letter from the Mayor of Grandview challenging the action on environmental grounds. The FAA received no governmental environmental opposition until it received the mayor's letter on the very day it issued its decision and its supporting extraordinary circumstances evaluation. Regardless of any dispute over the timing of when FAA officials actually received the letter during that day, we consider this one letter of governmental opposition to be too little, and far too late in a public proceeding that had been ongoing for approximately two years. Thus, the FAA did not act arbitrarily or capriciously by concluding that there was no governmental opposition to the action.

Concerning citizen opposition, the FAA noted that it received 65 citizen letters opposing the project, of which only approximately 20 expressed environmental concerns. Even considering all of the opposing letters, however, the FAA concluded that this number was insufficient to constitute substantial opposition on environmental grounds where the population of the area most affected (the communities of Belton and Grandview) exceeds 40,000. The agency determination that 65 letters opposing the project (most of which did not voice environmental concerns) did not constitute a substantial controversy on environmental grounds is not arbitrary on this record.

The petitioners argue the FAA ignored evidence that, although the residents of Kansas City as a whole voted by referendum to pass an ordinance authorizing the city to proceed with the project, the majority of voters in wards closest to the airport voted "no," and the citizens of Belton and Grandview, the areas most affected, had no vote. The petitioners assert that these circumstances reflect a concern that the project was highly controversial on environmental grounds. We disagree. Although the citizens of Belton and Grandview have no vote on ordinances affecting property within the City of Kansas City, four of the thirty-five public meetings were held in Grandview in an effort to give its citizens an opportunity to voice their concerns about the project, yet no substantial environmental opposition arose. Also, those Kansas City residents who voted "no" for the project did not provide any reasons explaining their vote and evidently did not write letters to the FAA informing it of any environmental concerns. Thus, the FAA did not act arbitrarily by ignoring the evidence of "no" votes in wards closest to the affected area and the citizens of Belton and Grandview certainly were not isolated from the proceedings.

2. Community Disruption and Surface Traffic

The petitioners contend that the FAA ignored or improperly discounted evidence indicating that a substantial community disruption was likely and that the action would cause a significant increase in surface traffic congestion. This contention lacks merit. The FAA's categorical exclusion evaluation did consider the potential for

community disruption and added surface traffic, concluding in relevant part that the project will not adversely affect local traffic movement and that planned highway improvements will more than adequately handle the traffic generated by the intermodal facility.

The FAA found that the Missouri Department of Transportation (MDOT) has considered the proposed intermodal facility in its design for improving Route 150, Route 58, and the interchanges of I-435, I-470, and Route 71. MDOT reported by letter that the planned roadway and interchange improvements will accommodate the additional truck traffic from the facility, even at its "full build out." (Petitioners' App. at 55.) The Environmental Documentation Report submitted by Kansas City, and considered by the FAA, notes that using railcars to carry more than one truck container actually results in fewer trucks on the roadways. (*See id.* at 615.) This report notes that "[b]ased on traffic studies to date, the intermodal facility will contribute less than 1% increase in traffic" to the area. (*Id.* at 616.) The report concluded that even in the worst case scenario, the adverse traffic effects of increased truck and rail traffic would be offset by new highway construction and improved intersections. An agency may rely "on mitigating measures to be undertaken by a third party" in making its finding of no significant impact. *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992).

Additionally, the FAA found that no additional train traffic would occur for five years, after which the train traffic could be expected to increase 16% over the next twenty years. The Kansas City Southern Railway Company indicated that even assuming a 10% growth rate per

year, no additional trains would be required in the first five years of operation because the present trains are currently running under capacity. (*See* Petitioners' App. at 649.) Based upon these studies and the opinions of expert consultants, the FAA found that the anticipated increase in train and truck traffic will not significantly affect the movement of local traffic or alter any planned development. The record supports this finding.

The petitioners argue that the FAA acted arbitrarily by relying on documents that underestimate the capacity of the facility, which is measured in "lifts per year."[4] The petitioners argue that the FAA estimated only 120,000 lifts per year, yet plans to develop the facility show that up to about 500,000 lifts per year will be performed, which represents only about 70% of the facility's capacity. The petitioners assert that 100% growth is reasonably foreseeable and should be assumed.

We are not in a position to question the veracity of the growth estimate. The Environmental Documentation Report and its supporting exhibits indicate an initial estimation of 120,000 lifts per year, but the report also assumes a twenty-year growth pattern, stating that "Kansas City Southern is hoping to grow the facility to about 500,000 lifts a year." (Petitioners' App. at 641.) In the next sentence, the report states that "[t]he goal factor is about 10% a year." All of this information was contained in the

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[4] A lift is accomplished by an overhead crane that either takes a truck trailer off the ground and places it on the rail car or vice versa. (*See* Petitioners' App. at 642.) Lifts are the means by which revenue is generated for the facility.

Environmental Documentation Report, which was properly before the agency. The FAA's findings are supported by this documentation, and the FAA has articulated a rational connection between the facts and the conclusions it made. The FAA was entitled to rely on expert documentation provided in the record, and we cannot say that the agency's findings on this point lack substantial evidence to support them.

The petitioners argue that the FAA's reliance on the Environmental Documentation Report, which concludes that there is no significant impact from the proposal, is arbitrary and capricious because it was provided by Kansas City, a proponent of the project. They also question the source of information underlying the MDOT's projections of intermodal traffic. The FAA urges that it independently reviewed the environmental consultants' analysis and concurred with the conclusions reached. The FAA also asserts that it is allowed to rely on the opinion of a state government agency. We agree with the FAA. Our duty is merely to ensure that the agency considered the proper factors and made no clear error of judgment. *See Marsh*, 490 U.S. at 378. "Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Alaska Ctr. for the Env't*, 189 F.3d at 859. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. We conclude that the FAA was entitled to rely on expert consultants, including the opinions of

other governmental agencies, especially where the evidence deals with scientific judgments. *See United States v. Grand Labs., Inc.*, 174 F.3d 960, 964 (8th Cir. 1999).

3. Noise Pollution

The FAA found "that most of the DNL 65 dB noise contour resulting from the intermodal facility's train and truck traffic will remain well within the facility's boundaries." (Petitioners' App. at 32.) The symbol DNL (or Ldn) represents the "[d]ay-night average sound level," which is a decibel measurement of the average sound level for a 24-hour period. 14 C.F.R. § 150.7. The FAA has determined that all land uses are considered to be compatible with noise levels that are less than DNL 65 dB. *Id.* § A150.101(d). Airports are required to develop noise exposure maps showing contour lines of DNL 65, 70, and 75 dB. In areas where the noise level is DNL 65 dB or greater, land uses must be identified and their compatibility determined.

To this end, the FAA has developed a table indicating appropriate noise levels that can be tolerated for different land uses. The noise sensitive area nearest to the proposed facility is the Belton Community Golf Course, which is 800 feet away from the noise source. The land use table indicates that a golf course can tolerate noise levels of DNL 65-70 dB. *See* 14 C.F.R. Pt. 150, App. A, Table 1-Land Use Compatibility. The study indicates that the nearest point of the golf course is within the 65-70 dB contour lines of the facility. The nearest residence is located over 2000 feet away, which is well away from the DNL 65 dB contour line even under the full build-out

scenario. Accordingly, the FAA concluded that the project will not significantly increase noise in any noise sensitive areas, and therefore no further analysis was necessary.

The petitioners contend that the use of an unreasonably low number of expected lifts adversely affected the noise study. We disagree. The record indicates that the noise study includes full calculations for a full build-out scenario, as well as calculations based on the 120,000 lift estimation. The Environmental Documentation Report specifically took into account the full build-out scenario, providing full calculations for a full build-out of the facility. The study indicated that resulting noise levels were well below acceptable levels. The full build-out calculations indicate a DNL 70 dB in the worst-case scenario. Additionally, the study indicates that "the intermodal facility only generates noise in a localized and limited area (300 to 700 feet) adjacent to the facility, while the airport generates noise patterns extending over 5,000 feet away." (Petitioners' App. at 810.) There is no indication that the FAA ignored evidence relevant to the noise impact of the facility.

The petitioners also assert that the FAA ignored the possibility of continued airport use of the facility. To the contrary, the FAA addressed the potential noise impact from continued use of the facility as an airport as a cumulative impact but concluded that while there is a possibility of future airport development at this site, there is no proposal reasonably foreseeable at this time. Furthermore, any future airport plans would be subject to appropriate environmental review when proposed. Thus, this possibility is an insufficient basis on which to find that the FAA's action at this time was arbitrary.

The petitioners' remaining contentions are based in large part on the opinion of their own expert, which was not made a part of the administrative record. Through a motion to this court, petitioners sought to supplement the record with letters and expert opinions that were not before the agency, in order to show that the agency overlooked substantial environmental issues and relevant factors. We are not in a position to substitute our own judgment for that of the agency by considering expert testimony that was not made a part of the administrative record. "[W]hen a litigant challenges an agency determination on grounds that, in essence, allege that the agency's expert review was incomplete, inconclusive, or inaccurate, the greater degree of deference expressed by the arbitrary and capricious standard is appropriate." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992) (alterations, quotations, and citations omitted). Once we determine that an agency's discretion is truly informed, we must defer to that informed discretion. *See Marsh*, 490 U.S. at 377; *Greenpeace*, 14 F.3d at 1332; *see also Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998) (noting that our inquiry ends when we are satisfied that the agency considered all of the information available at the time of its decision).

Our review of the record indicates that the FAA considered all relevant factors and available evidence relating to the noise impact of the facility. The FAA's conclusions are based on substantial scientific data, and not on mere speculation. NEPA does not require courts to resolve disagreements among experts. *See Greenpeace*, 14 F.3d at 1333. "[T]he record in this case reveals no complete failure to consider crucial factors." *Id.* Accordingly,

we deny the petitioners' motion to supplement the record.

In a noise-related argument, the petitioners contend that the noise impact of the facility on the nearby Belton Community Golf Course will interfere with enjoyment of the golf course so as to amount to a "use" of the property. Section 4(f) of the Department of Transportation Act provides in relevant part that the "use" of publicly owned land or a public park may be approved only if there is no feasible alternative and the project includes all possible planning to minimize the resulting harm. *See* 49 U.S.C. § 303(c). The FAA's Environmental Handbook provides that an action that is likely to use Section 4(f) lands is an extraordinary circumstance requiring an environmental assessment. (*See* Petitioners' App. at 902; FAA Order 5050.4A, ¶ 24(a).) As already noted, the FAA found that the nearest part of the golf course lies about 800 feet from the boundary of the proposed facility. The full build-out worst-case scenario shows a DNL 70 dB contour line encompassing property within 700 feet of the noise source and a DNL 65 dB contour line encompassing property within 700 to 1400 feet from the noise source. (Petitioners' App. at 834.) The FAA determined that the golf course is a compatible land use with the facility's DNL 65-70 dB level of noise. The record supports the FAA's finding that the proposed action will not physically take or "use" Section 4(f) property.

4. Air Quality

FAA Order 5050.4A, paragraph 24 (f), states that an extraordinary circumstance exists where a government

action has a significant impact on air quality. (*See* Petitioners' App. at 902.) The FAA considered the intermodal facility's potential effect on the air and determined that the resulting air quality impacts are not significant. Since its initial determination, however, the FAA has identified a mathematical miscalculation in its original analysis, which resulted in an underestimate of the air quality impacts. We permitted the FAA to correct the record calculations based upon accurate information. The new calculations provided by the FAA continue to indicate that the air quality effects of the new facility do not rise to a significant level.

The petitioners contend that the FAA overlooked a significant impact on air quality because the study was based on underestimated traffic assumptions. We concluded earlier that the traffic analysis was not seriously underestimated. The petitioners also point to the opinion of their own expert for their assertion that the FAA's air quality analysis is flawed. We have denied their attempt to supplement the record with this expert opinion. Also, there is no merit to the contention that an EIS must be prepared whenever qualified experts disagree. *See Greenpeace,* 14 F.3d at 1335. We refuse to engage in a de novo review of scientific data and opinions that are within the expertise of the agency.

5. Historical Property

The Friends assert that the facility will have an adverse effect on a historical property. Although one building on the property is potentially eligible for protection under the National Register of Historic Places, the

FAA determined that it is outside of the area of potential effect because it is not within the boundary of the lease, and any impacts on historical property resulting from the project will not extend beyond the lease line boundaries. We see nothing arbitrary in this decision. Also, the FAA considered the fact that the airport was named after two local pilots killed during World War I and the Korean War, but it concluded that this does not make the airport eligible for protection as a historic site. The FAA considered the relevant factors, and we will not disturb its finding of no significant impact.

6. Relocation Housing

The FAA's Airport Environmental Handbook states that an extraordinary circumstance exists if the action is "likely to be highly controversial with respect to the availability of adequate relocation housing." (Petitioners' App. at 902; FAA Order 5050.4A, ¶ 24(d).) The FAA found that the intermodal facility project is not controversial with respect to the availability of relocation housing because it does not involve any housing issues and will not require the relocation of any residents. The FAA also considered that the action will require the closure of the fixed base operation and the hangar facilities at the airport. The FAA found that sufficient general aviation facilities are available in the area, although the hangar space is inadequate. In spite of the inadequacy of available hangar space, the FAA did not alter its finding that the action is not highly controversial on the issue of relocation housing.

The Friends contend that the FAA defined adequate relocation housing too narrowly by ignoring the inadequacy of available hangar space for aircraft that will need to be relocated. They cite 42 U.S.C. § 4601(6)(A) (1994), of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which defines "displaced person" as "any person who moves from real property, or moves his personal property from real property" as a direct result of an agency action. The Friends contend that the agency's interpretation of the statute as involving only housing issues, and not also displacement of personal property, reads the statute too narrowly.

In the context presented here, we disagree. The FAA's order is specifically concerned with the environmental impact of agency actions that relocate people or businesses. We do not believe the FAA purports to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act in its handbook. Instead, the FAA is implementing the policies of NEPA and has discretion in doing so to decide that the displacement of people from their housing has a significant impact on the human environment, while the relocation of airplanes does not. Nothing in the handbook prevents the pilots from obtaining any federal assistance to which they may be entitled under the Uniform Relocation Assistance and Real Property Acquisition Policies Act due to the relocation of their personal property. The FAA was not arbitrary in deciding that any difficulty experienced in obtaining hangars for relocated airplanes does not create an environmental concern requiring the preparation of an environmental assessment in this case.

7. Railroad Construction

The Friends also contend that although the agency may properly categorically exclude the release of airport property, it may not categorically exclude the construction of a railroad track. However, the FAA did not categorically exclude the construction of a railroad track. The FAA properly considered the potential environmental impact that might result from the proposed facility. Whether the construction of track is considered a railroad line subject to the jurisdiction of the Surface Transportation Board (STB), *see* 49 U.S.C. § 10501(b) (Supp. IV 1998), or an industrial, team, switching, or side track that is not within the STB's jurisdiction, *see* 49 U.S.C. § 10906 (Supp. IV 1998), is a matter to be considered in the first instance by the STB. We agree with the FAA that this question is not properly before us at this time. It is enough that the FAA considered the relevant resulting environmental factors and determined them to have no significant impact on the environment.

B. The Decision to Release the Federal Obligations

The Aircraft Owners and Pilots Association (AOPA) challenges the FAA's authority to grant a release from the federal obligations that were imposed upon Kansas City by reason of the Surplus Property Act and the Airport Improvement Act. Because AOPA did not make this challenge before the agency and has not proffered any reasonable basis for not making the objection at that time, we will not consider the argument here. *See* 49 U.S.C. § 46110(d) (stating that the court reviewing an FAA order may consider only those objections made in the agency

proceeding, unless there was a reasonable basis for not making the objection earlier); *see also Northwest Airlines, Inc. v. FAA*, 14 F.3d 64, 73 (D.C. Cir. 1994) (noting that even objections challenging the agency's authority to act must be raised before the agency in the first instance).

AOPA also challenges the decision to release the federal obligations as arbitrary, capricious, and contrary to law. In this case, Kansas City sought release from its federal obligations to make the airport available to the public for aeronautical use. The FAA granted the request, finding in its amended and restated memorandum of agreement that "the City has subsidized the Airport with revenue from the other airports owned and operated by the City" and that "the City has identified an alternative use for the Property that will generate additional revenue for the regional aviation system and permit aviation funds now used to subsidize Richards-Gebaur to be used for future improvements" at Kansas City's other airports. (Petitioners' App. at 879.) Additionally, the memorandum specifically finds:

> [I]n consideration of the number of public-use general aviation airports in the Kansas City area; the fact that at least three of these airports are within convenient driving distance of the areas served by Richards-Gebaur; the fact that the sponsor of Richards-Gebaur Airport, Kansas City, operates two other airports serving the Kansas City area; the fact that the remaining value of Airport Improvement Program (AIP) investments in Richards-Gebaur recovered from the City may be reinvested in other general aviation capacity projects in the Kansas City area; the fact that the proposed redevelopment

> of the Property will produce substantial revenue for aviation development in the Kansas City airport system; and the fact that a significant part of this revenue stream will be committed to general aviation projects in the Kansas City airport system; the FAA finds that highly unusual circumstances exist that would support a finding that the release and closure of the Richards-Gebaur Airport would result in a net benefit to aviation. . . . "

(Petitioners' App. at 880.)

The statute provides that the Secretary of Transportation "may waive" the conditions of a surplus property gift if the Secretary decides (1) that "the property no longer serves the purpose for which it was given," or (2) that "the waiver will not prevent carrying out the purpose for which the gift was made and is necessary to advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(1). The Secretary also "shall waive a term under paragraph (1) of this subsection on terms the Secretary considers necessary to protect or advance the civil aviation interests of the United States." *Id.* § 47153(a)(2); *see also* 14 C.F.R. § 155.3(a)(1), (2) (restating the statutory grounds that may be the basis for a release). AOPA contends that the FAA failed to satisfy the standards of the Surplus Property Act because nowhere in its findings did the FAA state that the waiver was "necessary," as required by the language of the statute. *See* 49 U.S.C. § 47153(a)(1)(B).

We initially reject the FAA's assertion that AOPA did not raise this plain language objection before the agency. The argument may not have been made as thoroughly as

it is in the petition for review, but AOPA specifically quoted the language of the statute in a letter to the FAA dated September 21, 1998, complaining that the memorandum of agreement "does not conclude or explain how the release 'is NECESSARY to advance the civil aviation interests of the United States.' " (Respondents' App. at 75 (quoting 49 U.S.C. § 47153(a)(1)(B), emphasis in original)). We conclude that this complaint to the agency sufficiently preserved the plain language argument asserted here. Thus, we move on to consider whether the agency's interpretation of the statute in making the release was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

As AOPA complains, nowhere in the memorandum of agreement or in the actual letter releasing the property does the FAA specifically state that the release of the Richards-Gebaur Airport property is "necessary to advance the civil aviation interests of the United States," as it is worded in the statute. Instead, the memorandum of agreement lists all of the reasons why a release is beneficial and after considering them, concludes, in the language of an FAA order, that the release "would result in a net benefit to aviation." (Petitioners' App. at 880.) For the following reasons, we do not believe this to be fatal to the FAA's decision.

The regulation implementing the statute quotes the statutory language in large part without specifically interpreting how the FAA will determine when a release is "necessary" to protect or advance aviation interests. *See* 14 C.F.R. § 155.3(a)(2). In the FAA's interpretive order,

Order 5190.6A entitled Airport Compliance Requirements, the FAA states that "[a] total release, permitting the sale and disposal of real property acquired for airport purposes under the Surplus Property Act, shall not be granted unless it can clearly be shown that the sale of such property will benefit civil aviation." (Petitioners' App. at 1040.) The FAA's general policy regarding the release of surplus property allows property to "be released for sale or disposal upon a demonstration that such disposal will produce an equal or greater benefit (to the airport or another public airport) than the continued retention of the land." (*Id.* at 1040-41.) The FAA determined that such a release effectively authorizes "the conversion of a real property asset into another form of asset (cash or physical improvements) which better serves the purpose for which the real property was initially conveyed." (*Id.* at 1041.) The FAA's order states that an airport owner requesting a release must justify the request, and could do so by "showing that the expected net proceeds from the sale of the property at its current market value will be required to finance items of airport development and improvement; the need for which is concurred in by the FAA." (*Id.*)

Once again we must consider the persuasive force of an FAA order which is not the product of formal adjudication and not a regulation entitled to *Chevron* deference. *See Christensen,* 120 S.Ct. at 1662-63. Such decisions are " 'entitled to respect,' " but only to the extent that they have the " 'power to persuade.' " *Id.* at 1663 (quoting *Skidmore,* 323 U.S. at 140). AOPA argues that the FAA's order is not persuasive because it is contrary to the plain language of the statute. We respectfully disagree.

We maintain our long-standing opinion that "[a] statute is the command of the sovereign," and an agency implementing a statute may not ignore, or provide its own substitute for, a standard articulated in the statute. *See Sokol v. Kennedy*, 210 F.3d 876, 880 (8th Cir. 2000). We conclude, however, that the FAA has neither ignored nor provided a substitute for the articulated statutory standard in this case. Instead, the agency has properly exercised its discretion to add objective criteria to aid in its application of the statutory standard. Both the statutory and regulatory language states that a release must be "necessary to protect or advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(2); 14 C.F.R. § 155.3(a). The FAA's interpretive order provides some guidance for the agency's determination of what is "necessary" to this purpose. It is within the FAA's discretion to determine the criteria for assessing when a release is necessary to protect or advance civil aviation interests within the language of the statute.

The FAA's order interprets the statutory and regulatory standard as satisfied so long as the release of the property "can clearly be shown . . . [to] benefit civil aviation." (Petitioners' App. at 1040.) As earlier noted, this policy allows a release when the conversion of the real property into another asset better serves the purpose for which the real property was initially conveyed. A contrary interpretation would require the continued use of airport property in a manner that does not best serve the purpose of the original gift. We conclude that it was reasonable for the FAA to determine that a release providing a net benefit to aviation is "necessary" to advance

and protect civil aviation within the meaning of the statute.

AOPA does not challenge the factual record showing that the closure of the airport will result in a net benefit but challenges the FAA's failure to use the exact statutory language in its memorandum of agreement. The FAA counters that it was not required to use the exact statutory language in its findings, citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 n. 15 (D.C. Cir.) (stating, "[i]t is well established that ultimate findings do not have to be expressed at all, let alone be expressed in the language of the statute"), *cert. denied*, 426 U.S. 946 (1976). We agree with the FAA that in this instance, where the agency expressed its findings in the language of its interpretive order, which we have concluded reasonably interprets the statute, the FAA was not required to quote the exact statutory language in its findings. Despite the FAA's failure to couch its findings in the language of the statute, the record persuades us that the airport closure in this instance will result in an otherwise unavailable and significant benefit to aviation and therefore is necessary to advance and protect the aviation interests of the United States. Thus, the FAA's decision is not arbitrary, capricious, or contrary to law.

III.

Accordingly, we deny the petitions for review and affirm the order of the FAA releasing Kansas City from its federal obligations to maintain the property for

aeronautical use. All pending motions to supplement the record are denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1050

Friends of Richards-Gebaur Airport; City of Grandview, Missouri, a Municipal corporation, Petitioners, v. Federal Aviation Administration, Jane Garvey, Administrator, Respondent. City of Kansas City, Missouri; The Kansas Southern Railway Company, Intervenors on Appeal.	*	Petitions for Review of an Order of the Federal Aviation Administration.
Aircraft Owners and Pilots Association, Amicus on Behalf of Petitioner.	*	

No. 00-1974

Aircraft Owners and Pilots Association,

Petitioner,

v.

Federal Aviation Administration, Jane Garvey, Administrator; United States Department of Transportation, Rodney E. Slater, Secretary,

Respondents.

The Kansas City Southern Railway Company; City of Kansas City, Missouri,

Intervenors on Appeal.

JUDGMENT

This cause was submitted on petition for review of an order of the Federal Aviation Administration, on the original record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the Federal Aviation Administration is affirmed, order in accordance with the opinion of this Court.

(5272-010199)

June 11, 2001

A true copy.
ATTEST: /s/ Michael E. Gans

[LOGO]

U.S. Department
of Transportation
Federal Aviation
Administration

Memorandum

Date: December 23, 1999

Subject: **ACTION:** Categorical Exclusion Evaluation and Determination for the Federal Release of the City of Kansas City, Missouri, from its obligations to maintain aeronautical use of approximately 497 acres of the existing Richards-Gebaur Airport, Kansas City, Missouri.

From: Assistant Manager, Community and Environmental Needs Division, APP-600

To: Files

Reply to Attn. of: E. Melisky / 202-267-5869

The City of Kansas City, Missouri, is seeking Federal approval to release approximately 497 acres of the 1,362 +/- acres comprising Richards-Gebaur Airport. The Kansas City Southern Railroad is proposing to establish an intermodal cargo facility solely served by truck and train traffic. As a result, the released land will no longer be used for aeronautical purposes.

Since the released land contains the airport's only runway, the agreement to release will result in closure of the Richards-Gebaur Airport. Once closure of the airport occurs, FAA will issue an airspace determination per Order 7400.2D. The National Flight Data Center of FAA's Air Traffic Service will then publish this

information in the *National Flight Data Digest.* The *Digest* notifies the National Oceanic and Atmospheric Administration of the airport abandonment and results in removal of the airport from the *Airport Facility Directory.*

According to paragraph 23.a.(10) of the Federal Aviation Administration's (FAA) "Airport Environmental Handbook" (Order 5050.4A), the proposed Federal release of airport land is normally categorically excluded from the requirement to prepare an environmental assessment (EA), unless certain extraordinary circumstances, noted in paragraph 24 of Order 5050.4A, indicate that an EA must be prepared. To determine the potential applicability of these circumstances, FAA has carefully evaluated the environmental information the City of Kansas City provided to FAA in support of this land release. Our analysis is presented in the attached Categorical Exclusion Evaluation. In addition, the evaluation also addresses environmental concerns noted in correspondence that various individuals have sent to FAA regarding this project.

Based on the attached information, we have determined that the proposed release of airport land does not involve any extraordinary circumstances, and the action should be categorically excluded.

/s/ Ralph Thompson — 12/23/99
Assistant Manager, Community and Environmental Needs Division, APP-600 — Date

These decisions are taken pursuant to 49 U.S.C. 40101 et seq. and 49 U.S.C. 47101 et seq., and constitute orders of the Administrator which are subject to review by the Courts of Appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 46110.

CATEGORICAL EXCLUSION EVALUATION

1. National Historic Preservation Act of 1966 (NHPA) and Archeological and Historic Preservation Act of 1974 (AHPA). Cite: Reference 1, Section 5.0, and Reference 2, Chapter 3.4.6.

The FAA has determined that the Area of Potential Effect (APE) for the proposed release consists of the Kansas City Railroad (KCS) Lease Line Boundary shown on Reference 1, Attachment 7. FAA has determined that impacts resulting from the proposed land release and intermodal facility will not extend beyond the Lease Line boundaries (i.e., APE). (We note that Attachment 7 incorrectly identifies the APE as the area within the U.S. Air Force Air Base Boundary). After evaluating Reference 1, section 5, and Reference 2, Appendix K-1, FAA has determined that there are no properties on or eligible for listing on the National Register of Historic Places within the FAA's APE. Therefore, the requirements of Section 106 of the NHPA and the AHPA have been met. No further analysis is required by Order 5050.4A.

A commenter noted that the Richards-Gebaur Air Force Base (now Richards-Gebaur Airport) was named in honor of two local pilots killed during World War I and the Korean War; therefore, Section 106 of the NHPA applies to the proposed undertaking. Although the airport was

named in honor of Lt. John Richards and Lt. Col. Arthur Gebaur, respectively, that action alone does not make the airport a property eligible for inclusion in the National Register of Historic Places (National Register). For disclosure purposes, FAA notes that Building 602, the only property in the airport area potentially eligible for inclusion in the National Register (Reference 2, Appendix K-1), is located well outside of FAA's APE.

2. Noise. Cite: Reference 3, Section 3.5.

Review of Reference 3, Exhibit 13, shows that most of the DNL 65-dB noise contour resulting from the intermodal facility's train and truck traffic will remain well within the facility's boundaries. The contour segment north of Highway 150 lying outside the facility's northern boundary encompasses undeveloped farmland (Exhibit 13). The Belton Community Golf Course, located approximately 800 feet east of the intermodal facility's eastern boundary (Reference 1, Attachment 7) lies well beyond the facility's noise contour. As a result, the project will not significantly increase noise in any noise sensitive areas. No further analysis is required by Order 5050.4A.

3. Air Quality. Cites, Reference 1, Section 2 and Reference 3, Section 3.4.

Kansas City is an ozone maintenance area. Based on the intermodal facility air quality analysis, the potential emissions of NOx and VOC's are shown to be below the *de minimis* levels specified in 40 CFR Part 51.853, EPA regulations for determining conformity of federal actions with State Implementation Plans (SIP's). Therefore, the proposed intermodal facility project would conform to the state air quality plan (i.e., SIP). In addition, the Mid-

America Regional Council, the Kansas City Metropolitan Planning Agency, has noted that the proposed intermodal facility has been found to be consistent with assumptions used in the region's Long-Range Transportation Plan (TIP) and that the facility would not significantly increase regional emission levels, nor would the emissions associated with the facility trigger federal general conformity requirements. Emissions would fall within allowable growth in emissions projected in the regions air quality plans. As a result, FAA finds the project to be consistent with regional plans for maintaining the National Ambient Air Quality Standards. No further air quality analysis is required by Order 5050.4A.

4. Farmlands.

No farmlands are to acquired or will be affected. Therefore, no further analysis is required by Order 5050.4A.

5. Environmental Controversy. Cite: Reference 7.

The FAA has received 67 letters on the proposal – two letters favorable towards the proposal, and the remainder unfavorable. Of the unfavorable letters, 53 (about 80%) were form letters signed by pilots objecting to the closure of the airport. The FAA reviewed all letters to consider the objections raised in them. The primary objection (58 letters, including the 53 form letters) was that there was not sufficient public involvement in the decision.

The records show (personnel communication, Ralph Thompson, FAA, and Robert Cohn, Shaw-Pittman, Dec. 17, 1999) that Kansas City officials held numerous meetings with local public officials, and interested organizations, that were also open to the public. Kansas City also

held a public hearing at Hillcrest Community Center that was attended by approximately 200 people. It should be noted that the City of Kansas City conducted a referendum in August 1998 to allow its residents to decide whether to authorize the City to participate in a 50-year lease with the Port of Kansas City for the intermodal facility (personnel communication, Ralph Thompson, FAA, and Robert Cohn, Shaw-Pittman, Dec. 17, 1999). The referendum did not include communities such as Belton and Grandview, Missouri, which are located outside the boundaries of Kansas City. The Kansas City electorate approved the referendum.

The next two objections most frequently cited in letters submitted to the FAA (54-55 Letters, including the 53 form letters) were that jobs would be lost and an affluent community would be adversely affected. In addition to the above issues, Mr. McDermott, has noted concerns regarding potential air quality impacts, traffic congestion, golf course impacts (including air quality, noise, and visual impacts), historic property impacts, planned community disruption, and cumulative impacts. There were 4 other comments regarding potential traffic congestion and air quality impacts (1); the golf course (1); and lighting effects (2).

The FAA has carefully considered these comments and determined that there are no extraordinary circumstances warranting the preparation of an Environmental Assessment (EA). Based on the 1990 Census data for the communities closest to the proposed facility (Belton 18,145) and Grandview (24,973), the FAA has also determined that the 67 letters it received on the proposal do not constitute substantial opposition on environmental

grounds. In addition, no Federal, State, or local governments or agencies opposed the action on environmental grounds. As a result, this proposal is not considered highly controversial on environmental grounds.

6. Natural Environment. Cite: Reference 1, Section 6.0, Reference 3, Section 3.6, and Reference 4.

Federally-listed endangered and threatened species do not occur in the project area (Reference 4). Regarding the possibility of introducing invasive biotic species, the proposed intermodal facility will not be a Port of Entry. Instead, Port of Entry controls will be maintained at the existing U.S. border during the facility's first five years of operation. Any future changes in the facility's Port of Entry status will be coordinated with the U.S. Customs Service and other appropriate Federal agencies and will be subject to appropriate environmental review (Reference 1, Section 6). Therefore, no further analysis is required by Order 5050.4A.

7. Relocation Housing. Cite: Reference 5 and Reference 6.

The action does not involve the acquisition of any housing or relocation of residents. Therefore, this is not an action that is likely to be highly controversial with respect to the availability of relocation housing and warranting an EA.

FAA, however, received several comments regarding the relocation of aircraft or businesses. Closure of the airport and construction of the proposed intermodal facility will

require closure of a fixed base operator (FBO) and aircraft operations to move. The City of Kansas City is presently negotiating with the FBO regarding the termination of its lease for space at the airport. Adequate general aviation airport facilities are available in the metropolitan Kansas City area to accommodate displaced aircraft (Reference 6), but hangar space may not be sufficient.

8. Community Disruption. Cite: Reference 1, Section 3.0.

The Missouri Department of Transportation (MDOT) has considered the proposed Richards-Gebaur intermodal facility in its design for Route 150. MDOT reports that these improvements will accommodate additional truck traffic associated with the proposed intermodal facility. Since the facility will not have an access off of Route 150, it is expected that little if any facility-related truck traffic would use Route 58, favoring instead the more direct and truck friendly Route 150 (Reference 1, Attachment 3).

No additional train traffic will occur at the two grade crossings in the City of Grandview during first five years of operation. After that period, train traffic is expected to increase an average of 16% over the next twenty years. This increase will cause only 3 percent of the local traffic to experience delays up to 150 seconds Reference 1, Attachment 5). As a result, the proposed facility's rail traffic will not adversely affect local vehicular movement, nor will it alter any planned development. No further analysis is required by Order 5050.4A.

9. Section 4(f) of DOT Act. Cite: Reference 1, Section 7.0.

The City of Belton's Community Golf Course, which is leased from the City of Kansas City, is located in the vicinity of the proposed intermodal facility. Review of Reference 1, Attachment 7 shows that the fairway and green closest to the proposed intermodal facility lies about 800 feet from the facility's boundary. Examination of the proposed facility's noise impacts (Reference 3, Exhibit 13) shows that the course lies well beyond the facility's DNL 65-dB noise contour. It should be noted that golf courses are considered a compatible land use with these levels of noise (14 CFR Part 150, Appendix A, Table 1)

After reviewing information provided by the proponent and letters from the Mid-American Regional Council (Reference 1, Attachment 1, and Reference 3, Attachment 12), FAA has determined that the project will not significantly increase noise or degrade air quality in the project area, including the golf course. Therefore, FAA has determined that the proposed action will not physically take or constructively use any 4(f) property. No further analysis is required by Order 5050.4A.

10. Water Quality and Wetlands. Reference 3, Chapter 3.6.

The proposed intermodal facility's seven road crossings will affect isolated waters and unnamed tributaries to Mill Creek and Little Blue River. Based on information the proponent submitted to the Corps of Engineers (Corps) regarding these crossings, the Corps has authorized these crossings under Nationwide Permit No. 14.

The Missouri Department of Natural Resources certified that the project will not violate any water quality standards (Reference 3, Appendix E, letter dated March 15, 1999). No further analysis is required by Order 5050.4A.

11. Consistency. Cite: Reference 3.

The proposed project is consistent with applicable Federal, State, and local laws relating to the environment. No further analysis is required by Order 5050.4A.

12. Hazardous material. Cite: Reference 1, Section 4 and Reference 3, Section 3.3.

Building 1010 and its adjacent land appears to be the only contaminated site located within the area where project-related subsurface disturbance will occur. The City of Kansas City has hired a consultant to investigate the building and adjacent septic system field for potential hazards and to determine the need for potential cleanup. The City has committed to conducting whatever cleanup is necessary for this site before commencing construction thereon. (personnel communication, Ralph Thompson, FAA, and Robert Cohn, Shaw-Pittman, Dec. 17, 1999).

There are a few other sites within the boundary of the proposed intermodal facility that are know [sic] to contain hazardous materials, but these sites will not be affected by project related subsurface disturbance. For these particular sites cleanup is either underway or completed. The Army Corps of Engineers (Corps) is the remediation agency involved with cleanup efforts associated with the West Burn Pit (ibid.). The Burn Pit site is

scheduled to be clean and clear before execution of the land use agreement. In addition, the Air Force and Corps are currently working to remediate six underground storage tanks/lines; remediation is schedule for completion by March 1, 2000 (ibid.). Building 1011 has been surveyed and remediation completed (ibid). No further analysis is required by Order 5050.4A.

13. Cumulative Impacts Consideration: Reference Section 3.3 of Volume I of the Environmental Documentation Report and Section 4.0 of the Supplemental Information.

Regulations implementing the NEPA require Federal agencies to consider "cumulative actions, which when viewed with other proposed actions, have cumulatively significant impacts and should therefore be discussed in the same impact statement" (40 CFR, 1508.25(a)(2)). An agency must analyze the incremental impact of the action, "when added to other reasonably foreseeable actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 CFR, 1508.7).

During its environmental analysis for the proposed action, FAA has examined relevant past and reasonably foreseeable future roadway and aviation projects. As noted later in this section, the only reasonably foreseeable actions involve the following proposed roadway activities:

a. Improvements to Route 150;

b. Improvements to Route 58; and

c. Interchange improvements for I-435, I-470, and Route 71 (Grandview Interchange).

Environmental findings for proposed roadway activities:

The Federal Highway Administration (FHWA) is planning a number of roadway improvements to accommodate future traffic demands in the Kansas City area that are unrelated to the proposed intermodal facility. FHWA recently completed NEPA documents for these actions. On January 11, 1996, FHWA issued a Finding of No Significant Impact (FONSI) for Route 150 improvements (Reference 3, Exhibit 8). On August 17, 1999, FHWA concurred with MDOT's Categorical Exclusion determination for Route 58 improvements (Reference 3, Exhibit 8). On July 7, 1999, FHWA updated a June 9, 1998, Categorical Exclusion for the Grandview Interchange after assessing proposed design changes to that proposal (personal communication, Ken Ornes, FAA, Central Region, with Steven Harmoni, MDOT, Kansas City District Office, Dec. 17, 1999). MDOT notes that it considered the intermodal facility's truck traffic during the design of the proposed road improvements and that these improvements will more than adequately handle the intermodal traffic (Reference 1, Attachment 3).

Information on aviation-related activities:

The proposed Amended and Restated Memorandum of Agreement (MOA) that is part of this proceeding (Reference 6) notes that the Kansas City Council passed a resolution expressing the City's intent to maintain a general aviation (GA) airport on the Richards-Gebaur Airport and directed the Kansas City Airport Authority (KCA) to prepare a Master Plan for general aviation at

Richards-Gebaur Airport. In October 1999, KCA selected a contractor to prepare the Plan and issued a Notice to Proceed. In addition, the MOA states that: (1) KCA agreed to undertake significant general aviation (GA) airport improvements with local funds; and (2) FAA has identified other currently unfunded GA airport projects in the metropolitan Kansas City area that will be funded in accordance with the MOA if a relocated airport is not built.

Although the Master Plan is underway, KCA has not yet determined if there is a need for a new GA airport or if other general aviation projects will be pursued.

Since solutions to the metropolitan area's GA demands are not reasonably foreseeable, it is not necessary to include future, unknown GA facilities in the cumulative analysis for the proposed release of Richards-Gebaur Airport. If KCA requests FAA approval of Airport Layout Plans and Airport Improvement Program funding for any future GA facilities that an acceptable Master Plan identifies or when other sponsors do so, FAA will complete appropriate environmental review and coordination for [sic] with those facilities.

Cumulative impacts of these activities.

Turning to cumulative impacts and natural resources in light of other activities in the project area, FAA identified air quality and traffic congestion as key areas of concern, since reasonably foreseeable projects (highway development) would affect these resources.

FAA's analyses, in conjunction with information from the Mid-America Regional Council, the Missouri Department

of Transportation, and a special TranSystem report on vehicular and rail interactions, show that the proposed airport release will not cause significant cumulative air quality or traffic congestion impacts for the following reasons.

Air quality: The FAA's analysis of air quality data in Reference 1, Section 2, Reference 3, Section 3.4 and Appendix C, and the analysis of the Mid-America Regional Council (Reference 1, Attachment 1), show the proposed facility will not significantly increase regional air emission levels. Therefore, FAA's action and other reasonably foreseeable actions in the area will not cause cumulative air quality impacts (see section 9 of this evaluation).

Surface traffic congestion: The MDOT has considered plans for the proposed Richards-Gebaur intermodal facility in its design changes to planned, area roadway improvements to the Grandview Triangle (the interchange for I-435, I-470 and Route 71) and Routes 58 and 150 (Reference 1, Attachment 3). That department has found that the, "current designs can more than handle the additional truck traffic that would be generated by the intermodal facility." The FAA concurs with this finding.

The FAA's assessment of the proposed intermodal facility's train traffic on community vehicular traffic shows that rail activity will not adversely affect local vehicular traffic (see section 7 of this evaluation). Therefore, local roadways will remain at acceptable Levels of Service as train traffic increases during the upcoming years.

Based on its evaluation of impacts, the FAA has determined that the proposed action will not cause significant cumulative impacts or traffic congestion.

References:

1. Addendum Environmental Documentation Report, December 2, 1999

2. Environmental Documentation Report. Proposed Richards-Gebaur International Freight Gateway Volume II of II (Final Environmental Impact Statement, July 1994, Disposal and Reuse of Richards-Gebaur Air Force Base, Missouri

3. Environmental Documentation Report. Proposed Richards-Gebaur International Freight Gateway Volume I of II.

4. Memo to File, Richards-Gebaur Airport, Ed Melisky, November 15, 1999.

5. Robert Cohn memorandum to David Bennett, December 14, 1999.

6. Draft Amended and Restated Memorandum of Agreement, December 16, 1999.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1050/1974

Friends of Richards-Gebaur Airport, et al.,	*	
Petitioners,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Federal Aviation Administration, et al.,	*	
Respondents.	*	

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

(5128-010199)

September 19, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
AND CITY OF GRANDVIEW, MISSOURI,

Petitioners,

v. Case No. 00-1050

FEDERAL AVIATION ADMINISTRATION;
JANE GARVEY,

Respondents,

and

CITY OF KANSAS CITY, MISSOURI;
KANSAS CITY SOUTHERN RAILROAD,

Intervenors-Respondents.

DECLARATION OF ED MELISKY

1. I am an Environmental Specialist in the Community and Environmental Needs Division of the Office of Airports in the Federal Aviation Administration. I have been employed in this office since October 1990. My duties include reviewing environmental documents for technical sufficiency, including air quality analyses.

2. I graduated from University of Pittsburgh, Pittsburgh, Pennsylvania with Bachelor of Science degree in Biology in 1974. I obtained a Master of Science in Fisheries Biology from Frostburg State College, Frostburg, Maryland in 1980.

3. Following my review of the affidavit of James A. Case dated February 29, 2000 filed by petitioners in the above-referenced matter, I have determined that the

estimate of emissions in the air quality analysis submitted by Kansas City to the FAA in support of a categorical exclusion (Appendix C of Volume I of the Environmental Documentation Report, Petitioners' Appendix APP 796-809) contained a mathematical error.

4. The calculations in Attachment C to Appendix C for carbon monoxide (CO) emissions (Petitioners' Appendix APP 806) assumed that the number of vehicles (cars) projected to travel to the facility in the year 2000 was 389. This is incorrect. Based upon the Daily Traffic Projections for M-150 West of U.S. 71 in Appendix A, Volume 1 of the Environmental Documentation Report, Traffic Study for Richards-Gebaur Intermodal Facility dated June 1998, Petitioners' Appendix APP 696, 389 cars are projected to travel to the facility each day.

5. Assuming that there is a 251-day work year in the year 2000, I recalculated the potential emissions of hydrocarbon (HC) (used to estimate volatile organic compounds), nitrogen oxides (NOx), and CO using the formula in Attachment C, Appendix C. The assumption of a 251 day work year in the year 2000 is consistent with the 250 day work year assumption made by Kansas City's consultant in preparing the noise analysis for the intermodal facility (Appendix D of Volume 1 of Environmental Documentation Report, Huff & Huff Calculation Sheet, Assumptions, Petitioners' Appendix APP 836).

6. I used the worst-case emission factors (EF) set forth in Attachment B, Appendix C (Mobile5 output) to project emissions. Petitioners' Appendix APP 803-804. According to Attachment C, among other things, these emission factors are based upon the assumption

that vehicles travel 10 mph for 2.184 miles, the distance from the center of the intermodal facility to U.S. 71.

7. For cars, which are designated light duty gas vehicles, or LDGV, the worst-case emission factors in the year 2000 are: HC-14.14, NOx-2.24, and CO-113.61. For trucks, which are designated heavy-duty diesel vehicles, or HDDV, the emission factors are: HC-3.34, NOx-13.84, and CO-20.80. (Petitioners' Appendix 803).

8. For example, hydrocarbon emissions for cars in the year 2000 were calculated as follows: EF (14.14) x distance traveled (2.184) x number of vehicles (389 x 251) = (30.9) x (97,639) = 3,017,045.1 grams per year. Grams were converted into tons by dividing the total grams per year by 454, the number of grams in a pound, and then tons were determined by dividing the number of pounds by 2000, the number of pounds in a ton. 3,017,045.1 grams per year/454 grams/pound = 6,645 pounds/year. 6,645 pounds/yr/2000 = 3.3 tons.

9. For the year 2018, I calculated emissions by assuming that there would be a 365-day work year. The worst-case emission factors in the year 2018 for cars, or light duty gas vehicles, are: HC-11.44, NOx-1.97, and CO-83.32. The worst-case emission factors for trucks, or heavy duty diesel vehicles, are: HC-3.14, NOx-8.51, and CO-20.07. (Petitioners' Appendix APP 804).

10. The following tables set forth the recalculated emission estimates:

Year 2000 Emissions

	HC (VOC) tons/yr.	NOx tons/yr.	CO tons/yr.
Cars	3.3	0.5	26.7
Trucks	1.1	4.6	6.9

Year 2018 Emissions

	HC (VOC) tons/yr.	NOx tons/yr.	CO tons/yr.
Cars	13.7	2.4	99.9
Trucks	4.6	12.3	29.1

I declare under the penalty of perjury under the laws of the United State [sic] of America that the foregoing is true and correct.

/s/ Ed Melisky
Ed Melisky

Executed on April 10, 2000

No. 01-949

JAN 24

In The

Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States, the undersigned counsel for the Aircraft Owners and Pilots Association (AOPA) hereby certifies that there exists no parent company to AOPA, and no publicly held company owns 10% or more of AOPA's stock. AOPA is a national, non-profit association of more than 375,000 members dedicated primarily to issues related to general aviation.

Dated: January 24, 2002

Respectfully Submitted,

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ARGUMENT

THE EIGHTH CIRCUIT DEVIATED FROM LAW AND PRECEDENT IN AFFIRMING THE FAA'S DECISION TO RELEASE A CITY FROM ITS FEDERAL OBLIGATIONS TO MAINTAIN AN AIRPORT AS AN AIRPORT

The Eighth Circuit's decision is in conflict with Supreme Court decisions and is contrary to other federal circuit decisions, including its own. This precedent opens the way for administrative agencies to abuse the great, but not unfettered, power and discretion recognized by courts in reviewing administrative interpretations of statutory schemes.

In deciding *Friends of Richards-Gebaur v. FAA*, 251 F.3d 1178, 1195 (8th Cir. 2001), the Eighth Circuit misapplied the well-established principles of law articulated by the Supreme Court in cases beginning with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), through the most recent case of *United States v. Mead Corp.*, 533 U.S. ____, 121 S.Ct. 2164 (2001). As mandated by *Skidmore* and its progeny, the court was required to apply the unambiguous language of Congress to the actions of the FAA. Failing to do so, the Eighth Circuit erroneously gave deference to an administrative agency's statutory interpretation by relying on an FAA Order that exists only as an internal guideline, not adopted in accordance with formal rule-making procedures. As such, it is only due respect, and only to the extent the Order has the power to persuade, under *Christensen v. Harris County*, 529 U.S. 576 (2000), and *Skidmore*. Finally, the Eighth Circuit gave the FAA interpretation persuasive power despite the FAA failing to demonstrate a discernible path between its standard in Order 5190.6A and the standard in 49 U.S.C. § 47153. Because of this failure, the FAA's interpretative guidance does not hold any power to persuade and thus

does not warrant respect, much less deference. By failing to apply and follow the clear intent of Congress, the Eighth Circuit granted the FAA's Order unwarranted deference. By overlooking the plain language of the statute and then inappropriately according an administrative order a level of deference akin to *Chevron*, the Eighth Circuit has misapplied the law that has been defined and refined by the Supreme Court as it applies to administrative agency decisions.

A. The Legal Standard

The issue of how much deference is due administrative regulations, rulings, interpretations, and orders has developed through a series of cases before the Supreme Court. The Court has consistently held that when a statute unequivocally expresses Congressional intent, deference does not apply to administrative interpretations of that statute. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Only when "the statute is silent or ambiguous with respect to the specific issue" does the reviewing court then turn to "whether the agency's answer [to ambiguity or silence in the statutory scheme] is based on a permissible construction of the statute." *Id.* at 843. If the agency's answer is a permissible construction of statute, only then is deference due the agency's interpretation. *Id.*

Chevron also calls for "considerable weight" to be given to an agency's interpretation of a statutory scheme it is to administer when that statutory scheme creates a conflict in policies. *Id.* at 844. If the interpretation is a "reasonable accommodation of [the] conflicting policies," then the interpretation should stand unless it appears from the statute or legislative history that Congress would not

have approved of the agency's position. *Id.* at 845. *See also Christensen v. Harris County*, 529 U.S. at 586 (2000) (*Chevron* requires deference when an agency's regulation is "a reasonable interpretation of an ambiguous statute").

This Court most recently addressed *Chevron* deference in *United States v. Mead Corp.*, 533 U.S. ___, 121 S.Ct. 2164 (2001). *Mead* explains that *Chevron* deference is due only when Congress delegated an agency the general authority to make rules carrying the force of law. Further, deference is due only when those interpretations for which deference is sought were promulgated under that authority. *Id.* at 2171. This delegation of authority can be in the form of deliberate silence, an express delegation, ambiguity in the statutory scheme, or an explicit gap in the legislation; all are construed as an express delegation to explain a particular statutory provision by regulation. *Id.* Further, delegation may come when Congress implicitly intends for an "agency to be able to speak with the force of law" but only when it "address[es] ambiguity in the statute or fills a space in the enacted law." *Id.* at 2172. Only "[w]hen circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise" and the reviewing court must "accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* The hallmark "that Congress contemplates administrative action with the effect of law [is] when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* But where there is no congressional delegation of such power, the agency guideline is not owed *Chevron*-style deference. *Id.* In other words, where Congress did not provide for formal procedures for issuing guidelines,

and where interpretive authority is questionable, *Chevron*-style deference is inapplicable. *Id.* See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *Christensen v. Harris Co.*, 529 U.S. at 596 (Breyer, J., dissenting).

Chevron and its progeny clearly demand that deference only apply in those situations where there is a delegation of authority to act with the force of law, either by express direction, by ambiguity, or by an explicit gap in the statutory scheme. When such delegation is made, the reviewing court must accept an agency's answer to silence or ambiguity in the statute if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Thus, if "an agency's regulation contain[s] a reasonable interpretation of an ambiguous statute," the reviewing court must accept that interpretation. *Christensen*, 529 U.S. at 586. Therefore, there are only three instances where *Chevron*-style deference is inapplicable:

> (1) the statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency.

Id. at 589, FN * (Scalia, J., concurring). Further, "these [same] reasons preclude Skidmore deference as well." *Id.*

B. The Eighth Circuit's Decision

i. There is no ambiguity, express gap or silence, or express grant of power in either 49 U.S.C. § 47153 or 14 C.F.R. § 155.3 permitting the

FAA to interpret the standard for releasing airport obligations.

The Eighth Circuit conceded that *Chevron* is inapplicable to the instant case, yet it proceeded to apply a level of deference akin to *Chevron*-style deference. Further, the court made its concession on erroneous grounds. The court based its decision on the fact that FAA Order 5190.6A is not the product of formal adjudication and determined that the appropriate standard is one of respect to the extent the Order has the "power to persuade."

Chevron-style deference is inappropriate in this case, not because of the rule-making procedures engaged in by the FAA in creating Order 5190.6A, but rather because both the underlying statute and regulation are clear and unambiguous, leaving no gaps for the FAA to fill-in through interpretation. *See Mead*, 121 S.Ct. 2164; *Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring); *Chevron*, 467 U.S. 837.

In 49 U.S.C. § 47153, Congress unambiguously set the standard by which the FAA could release airports from terms under the Surplus Property Act. The FAA may waive a term if "the property no longer serves the purpose for which it was given." 49 U.S.C. § 47153(a)(1)(A). In the alternative, the FAA may waive a term if "the waiver will not prevent carrying out the purpose for which the gift was made *and* is *necessary* to advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(1)(B) [emphasis added]. In waiving the terms under 49 U.S.C. § 47153(a)(1), the Secretary of Transportation "shall waive a term...on terms the Secretary considers *necessary* to protect or advance the civil aviation interests of the United States." 49 U.S.C. § 47153(a)(2) [emphasis added].

In promulgating regulations to enforce the statute, the FAA replicated the standard set forth in the statute

essentially verbatim. The Administrator may grant releases if "[t]he release will not prevent accomplishing the purpose for which the property was made subject to the terms, conditions, reservations, or restrictions, and is *necessary* to protect or advance the interests of the United States in civil aviation." 14 C.F.R. § 155.3(a)(2) [emphasis added]. The regulation further echoed § 47513 in stating that the statute "authorizes the Administrator to grant the releases subject to terms and conditions that he considers *necessary* to protect or advance the interests of the United States in civil aviation." 14 C.F.R. § 155.3(a) [emphasis added].

In FAA Order 5190.6A, however, the FAA uses a different standard than that delineated by Congress in the underlying statute and in its own underlying regulation. *See* FAA Order 5190.6A at 7-2.a., 7-8.a., 7-8.a.(1), 7-37.a.(3), 7-37.b.(2) (Resp't App. at 4, 5, 7). Under the Order, the FAA announced a general policy that "[a] total release, permitting the sale and disposal of real property...shall not be granted unless it can clearly be shown that the sale of such property *will benefit* civil aviation." *Id.* at 7-8.a. (emphasis added) (Resp't App. at 5). Further, this section, upon which both the FAA and the Eighth Circuit relied, provides that where the "property is no longer needed to directly support an airport purpose or activity...it may be released for sale or disposal upon a determination that such disposal *will produce an equal or greater benefit* (to the airport or another public airport) than the continued retention of the land." *Id.* at 7-8.a.(1) (emphasis added) (Resp't App. at 5). Explaining this provision, the Order continues that this type of "release has the effect of authorizing the conversion of a real property asset into another form of asset (cash or physical improvements) *which better serves* the purpose for which the real property was initially conveyed." *Id.* (emphasis added) (Resp't App. at 5-6). The Order continues by stating that one of the "pertinent factors" to be considered

in evaluating a request for release from airport obligations is "[t]he *net benefit* to be derived by civil aviation..." *Id.* at 7-37.a.(3) (emphasis added) (Resp't App. at 7).

This faulty standard was repeated in the Memorandum of Agreement (MOA) between the FAA and the City of Kansas City, dated July 14, 1998, under which the FAA released the surplus property (Richards-Gebaur Memorial Airport) from all covenants and restrictions on use under the authority of 49 U.S.C. §§ 47122(a), 47153, 49 C.F.R. § 18.31, and FAA Order 5190.6A. Throughout the MOA, the FAA referred to the release as an action that would "benefit civil aviation" or that would "result in a net benefit to aviation."

> ...
>
> WHERAS, the FAA may release property obligated under the Surplus Property Act and under grant agreements, pursuant to 49 U.S.C. § 47122 (a) and § 47153, 49 C.F.R. § 18.31, and FAA Order 5190.6A, upon the repayment or reinvestment of certain amounts and upon a finding by the FAA that the release would benefit civil aviation;
>
> WHEREAS, it is the longstanding and continuing policy of the FAA to enforce the obligation under the Surplus Property Act and under grant assurances to maintain obligated property as a public airport, unless the net effect of closure of the airport would be a benefit to aviation;
>
> ...
>
> WHEREAS, in consideration of the number of public-use general aviation airports in the Kansas City area; the fact that at least three of these airports are within convenient

> driving distance of the areas served by Richards-Gebaur Airport, Kansas City, operates two other airports serving the Kansas City area; the fact that the remaining value of Airport Improvement Program (AIP) investments in Richards-Gebaur recovered from the City may be reinvested in other general aviation capacity projects in the Kansas City area; the fact that the proposed redevelopment of the Property will produce substantial revenue for aviation development in the Kansas city airport system; and the fact that a significant part of this revenue stream will be committed to general aviation projects in the Kansas City airport system; the FAA finds that highly unusual circumstances exist that would support a finding that the release and closure of the Richards-Gebaur Airport would result in a net benefit to aviation;
>
> ...

(Memorandum of Agreement from FAA to City of Kansas City of July 14, 1998, at pp. 1, 3.)[1] *See also* Resp't App. at 8. Nowhere, in any document, did the FAA ever directly state or imply that a release from obligations and the subsequent closure of the Richards-Gebaur Memorial Airport was "necessary to protect or advance" civil aviation, as prescribed and demanded by both § 47153 and § 155.3.

In common colloquy, there is a vast difference between something that is "necessary" and something that merely acts to "benefit." The American Heritage Dictionary

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[1] The full text of the Memorandum of Agreement is available in the Record as Addendum 1 of the Brief of Petitioner Aircraft Owners and Pilots Association.

defines "benefit" as "something that promotes or enhances well-being; advantage...[t]o be helpful or useful to...[t]o gain advantage." *The American Heritage Dictionary* 171 (2d College Ed. 1982). "Necessary" is defined as "absolutely essential; indispensable," "[n]eeded to achieve a certain result or effect; requisite," or "unavoidably determined by prior conditions or circumstances; inevitable." *Id.* at 834.

On the face of § 47153 and Order 5190.6A, the two standards are at opposite ends of the spectrum. Under the plain meaning of the standard utilized by the FAA, the question asked was whether the release of the obligations and closure of the Airport would benefit civil aviation by providing *an equal or greater benefit* by funneling funds to other airports. Had it applied the plain meaning of the statutory standard, the question would have been whether civil aviation would be harmed by keeping the airport open and not funneling the money designated for the Richards-Gebaur Memorial Airport to other airports in the area. Nowhere in Order 5190.6A does the FAA create a discernible path from "necessary to advance or protect" to "benefit[ing] civil aviation." By implicitly doing so itself, the Eighth Circuit not only rejected the clarity of the standard set forth by Congress, but it afforded an inappropriate level of deference to the administrative interpretation and granted an administrative agency more leeway than the power Congress intended to confer.

ii. The Eighth Circuit inappropriately applied a deferential standard equivalent to *Chevron*.

Although the court's reasoning was faulty in considering whether *Chevron* was applicable in this instance, the court's ultimate conclusion was correct – *Chevron*-style deference is not appropriate in the instant case. Notwithstanding this conclusion, the court proceeded to apply a deferential standard synonymous with *Chevron*.

See Friends of Richards-Gebaur Airport v. F.A.A., 251 F.3d 1178, 1195 (8th Cir. 2001). The court found that "order [5190.6A] interprets the statutory and regulatory standard as satisfied so long as the release of the property 'can clearly be shown...[to] benefit civil aviation.'" *Id.* The court noted that the converse would be to "require the continued use of airport property in a manner that does not best serve the purpose of the original gift." *Id.* Concluding, the court held that the FAA "reasonably interpret[ed] the statute" when it determined "that a release providing a net benefit to aviation is 'necessary' to advance and protect civil aviation." *Id.* As the case law suggests, though, "there is no room for administrative interpretation" when Congress unambiguously set forth the appropriate standard in the underlying statute. *See Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring). Only where there is silence or ambiguity in the statute, or where Congress expressly delegated the authority to make rules with the force of law, shall a court consider an agency's interpretation of that statute. *Mead*, 121 S.Ct. 2171, *Christensen*, 529 U.S. 586, *Chevron*, 467 U.S. at 843.

Consequently, the Eighth Circuit's decision creates a precedent that enables administrative agencies to act beyond their expressly delegated powers and beyond their interpretative authority, as has been traditionally recognized in cases of statutory ambiguity or conflict in policy created by statute. That precedent permits an administrative agency to act in circumvention of the plain and unambiguous intent of Congress, ultimately leading to the erosion of the public's trust.

iii. The Eighth Circuit should not have given deference to the FAA's interpretation, but merely respect to the extent it had the power to persuade, because it was set forth in an internal order designed as internal guidance

> and not subject to notice-and-comment under formal rule-making.

Notwithstanding the unambiguous nature of both the statute and regulation underlying Order 5190.6A precluding the need for deference, the Eighth Circuit further erred in applying a *Chevron*-like deference to the FAA Order. The Order was not issued after undergoing formal adjudicatory procedure under the Administrative Procedure Act, or even informal rule-making under which the public may participate through notice and comment procedures.

Over 50 years ago, the Supreme Court set the standard for instances like the present: administrative rulings adopted not in accordance with formal rule-making procedures are not binding on courts. They are nevertheless due respect, but only to the extent they have the power to persuade. *Skidmore v. Swift*, 323 U.S. 134, 139, 140 (1944).

This seminal principle was recently affirmed in *Christensen* when this Court held that agency interpretations set forth in opinion letters, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines" do not carry the force of law and thus "do not warrant *Chevron*-style deference". 529 U.S. at 587. *See also Mead*, 121 S.Ct. at 2175 ("'interpretations contained in policy statements, agency manuals, and enforcement guidelines'...are beyond *Chevron* pale"). Among those interpretations entitled to deference under *Chevron*, this Court noted that interpretations contained in regulations, *arrived at after undergoing formal rule making procedures*, should be deferred to. 529 U.S. at 587.

Further, the FAA was not delegated the authority to act with the force of law in interpreting 49 U.S.C. § 47153.

Where on the face of the statute, "the terms of the congressional delegation give no indication that Congress meant to delegate authority to [the agency to act]...with the force of law...", *Mead*, 121 S.Ct. at 2173-2174, the reviewing court "must continue to differentiate between *Chevron* and *Skidmore*." *Id.* at 2177. Where the administrative action is made without the force of law, the agency is at least entitled to "seek respect proportional to its 'power to persuade.'" *Id.* at 2175-2176.

iv. No respect, much less deference, is owed Order 5190.6A because the Order does not have the power to persuade.

In *Skidmore*, this Court recognized that an Administrator, by virtue of experience and knowledge, is "obliged to reach conclusions" so that he may properly enforce the law with which he is entrusted to administer. 323 U.S. at 138. Any rulings or interpretations that the Administrator makes in pursuit of this task are not binding on the courts if they are not made "as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact." *Id.* at 139. The Court did note, however, that any decisions by the Administrator would be made with more specialized experienced and information than a judge would have. *Id.* Despite the lack of formal rule-making, any policies, standards, rulings, and interpretations are entitled to respect. *Id.* at 140. The weight accorded will depend upon the particular action's power to persuade. *Id.* The power to persuade is based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," as well as additional factors. *Id.*

Skidmore does not save the FAA Order for two reasons. First, in *Skidmore*, Congress left an express gap for the courts and for the Administrator to fill because it did not

"utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." *Skidmore*, 323 U.S. at 137. Because there was an express gap, Congress intended the Administrator to act to fill that gap. Even though the Administrator's actions were not subject to formal rule-making, because such actions were intended by Congress, they were entitled to some respect so long as the Administrator explained his reasoning. As argued above, Congress left no gaps for the FAA to fill while legislating when an airport proprietor may be released from grant obligations under the Surplus Property Act. As such, Congress did not intend for the FAA to fill in any gaps with interpretations of § 47153.

Further, as Justice Scalia stated in his *Christensen* concurrence, there are only three situations in which *Chevron* deference is inapplicable, and those same three situations also work to bar *Skidmore* deference. *Christensen*, 529 U.S. at 589, FN * (Scalia, J., concurring). Because 49 U.S.C. § 47153, setting the standard under which grant obligations may be released, is not ambiguous, neither *Chevron* nor *Skidmore* apply.

Second, *Skidmore* calls for respect to the extent the agency's action has the power to persuade. 323 U.S. at 140. As argued above, the FAA did not provide any persuasive reasoning as to why providing a net benefit to civil aviation was anything other than a mere benefit as opposed to a necessity to protecting or advancing civil aviation. Nowhere in its Order did the FAA provide a line of reasoning connecting the two standards; they did not even state in the Order that the two standards, "net benefit" and "necessary," were used synonymously, as attempted by the National Park Service in *Sokol v. Kennedy, 210 f.3d 876 (8th Cir. 2000)*.

v. No deference is due FAA Order 5190.6A because 14 C.F.R. § 155.3 is unambiguous.

Just as there is no room for administrative interpretation when Congress unambiguously set forth the appropriate standard in the underlying statute, there is likewise no room for administrative interpretation when reviewing an agency's unambiguous regulation. Generally, agency interpretations of their own regulations are entitled to deference. *Christensen*, 529 U.S. at 588. *See Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). When faced with "a creature of the [agency's] own regulations, [its] interpretation of it is...controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), quoting *Robertson v. Methow Valley Citizens Council*, 490 I.S. 332, 359 (1989). *Christensen* expands this doctrine: "*Auer* deference is warranted only when the language of the regulation is ambiguous." 529 U.S. at 588.

This court limited the amount of deference due agency interpretations of their own regulations by noting "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* In the face of a clear, unambiguous regulation, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Id.*

Section 155.3 of Title 14 of the Code of Federal Regulations merely echoes the language of § 47153. As such, the standard purportedly interpreted in Order 5190.6A is not a creature of the FAA's regulations, but rather a creature of statute. Thus, the *Auer* principle does not apply in the present case. Additionally, the agency's interpretation of the standard contained in both the regulation and statute was both plainly erroneous and

inconsistent with that standard articulated in 49 U.S.C. § 47153 and 14 C.F.R. § 155.3.

Notwithstanding the inapplicability of *Auer* due to the standard being a creature of Congress, even if the standard were a creature of regulation, under *Christensen*, it was inappropriate for the FAA to interpret the standard set forth in the regulation because it was not ambiguous. At least one other circuit differs from the Eighth Circuit's decision on this point. *See Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998).

In *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), the Seventh Circuit reversed a Forest Service interpretation of its own Handbook (which was treated as a regulation because it was published in the Federal Register and had undergone notice and comment) because it contradicted the Handbook's plain language. Recognizing that the Supreme Court held that substantial deference is due an agency's interpretations of its own regulations, citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), the Seventh Circuit nonetheless rejected the agency's interpretation. The court noted "the power of an agency to interpret its own regulations 'must not be confused with the power to rewrite.'" *Rhodes*, 153 F.3d at 789, quoting *Pettibone Corporation. v. United States*, 34 f. 3d 536, 541 (7th Cir. 1994). Further, the court noted that "[d]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Id.*, quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment).

A year prior to deciding the present case, the Eighth Circuit itself refused to implicitly connect a statutory standard and the standard as applied by the National Park Service. *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000).

In evaluating free-flowing rivers and their immediate environments for inclusion in the protection of the Wild and Scenic Rivers Act, Congress called for the identification of "outstandingly remarkable...values." *Id.* at 877. In practice, however, the National Park Service looked to identify "significant" and "important values", a standard it was more familiar with. *Id.* Four years after its initial determination and initial report, the National Park Service "explained that 'significant' and 'important' were being used merely as synonyms for 'outstandingly remarkable.'" *Id.* While the court recognized that the agency had some discretion in administering the statute, it was in the context of deciding "which boundaries would best protect and enhance the outstandingly remarkable values...but it must identify and seek to protect those values, and not some broader category." *Id.* at 879. The court concluded that the "post hoc re-definitions...were not sufficient to correct past errors upon which" the agency had taken action. Further, "significant" and "important" were not synonymous with the statutory standard of "outstandingly remarkable...values" but were "much broader terms." *Id.* at 880, 879.

Similarly, the standard applied by the FAA in deciding to release the City of Kansas City from its grant obligations was much broader than that designated by statute. The statute requires that the proposed action be necessary - that it be inevitable, or absolutely essential and indispensable - to the protection or advancement of civil aviation. To merely benefit civil aviation means that the action would simply be useful or helpful in protecting or advancing civil aviation. Such terminology implies that the proposed course of action is in fact dispensable, that civil aviation would continue and would indeed advance without the occurrence. Viewed in such light, the standard utilized by the FAA is clearly much broader than the "necessary to

advance...civil aviation interests" standard developed by Congress.

By connecting the statutory standard of § 47153 and the standard of Order 5190.6A, the Eighth Circuit contradicted its own decision in *Sokol*. Further, it acted in conflict with the law as applied by other circuits when reviewing the power of an administrative agency to interpret a statute it is entrusted to administer. In creating such an overreaching precedent, the Eighth Circuit allowed the FAA to take advantage of the discretion traditionally exercised by courts in permitting administrative interpretations of the law. Finally, the FAA abused its own discretion and power by acting well beyond the acceptable use of such discretion and expertise in administering a statute entrusted to it. By doing so, the FAA acted to, and the Eighth Circuit allowed, the detriment of the public trust.

CONCLUSION

The Eighth Circuit disregarded the clear precedent established by the Supreme Court in applying a level of deference akin to *Chevron* to FAA Order 5190.6A. By treating the Order as a reasonable interpretation of the standard set forth in 49 U.S.C. § 47153 and 14 C.F.R. § 155.3, and accepting the FAA's determination that a release from airport obligations would result in a "net benefit" to civil aviation, the court ignored the plain and unambiguous language of Congress. That language clearly demands that a release from assurances be *necessary* to advance or protect civil aviation interest.

Even if 49 U.S.C. § 47153 were ambiguous, the Order would only be entitled to respect, to the extent it had the power to persuade, per *Christensen* and *Skidmore*. There is no indication that Congress intended the FAA to act with the force of law in interpreting the statute. There is no express gap or silence in the statute left to fill, no ambiguity

to clarify, nor is there an express delegation of power to interpret the statute. Additionally, the Order was not promulgated under formal rule-making procedures, but was designed as internal guidance. Under both *Christensen* and *Skidmore*, internal guidelines are not entitled to deference, but merely respect to the extent they can persuade. Even under this standard, however, the Order fails. There is no persuasive power in the Order because it fails to create a discernible path relating the "necessary" standard set forth in the statute and regulation to the "net benefit" standard set forth in the Order.

Finally, as an internal interpretation of its own regulation, the Order fails to earn deference. First, the regulation merely repeats the standard created by Congress in § 47153, and is thus not a creature of the agency but of Congress. Second, even if the regulation were a creature of the FAA, the Order fails to earn deference because the regulatory standard is set forth in clear and unambiguous language in § 155.3.

Section 47153 of 49 U.S.C. and § 155.3 of 14 C.F.R. clearly and unambiguously demand that a release from airport obligations be necessary to advance or protect civil aviation. FAA Order 5190.6A purports to interpret these provisions in an internal guideline that was not subject to public notice and comment. The guideline does not explain how its standard of "net benefit" relates to the statutory standard of "necessary" to the advancement or protection of civil aviation, leaving it bereft of any power to persuade. The Order thus fails to earn any level of deference or respect. Accordingly, the Memorandum of Agreement releasing Richards-Gebaur Memorial Airport from its grant obligations, which is based principally upon the standard set forth in Order 5190.6A, is invalid.

If the Eighth Circuit's decision stands, a dangerous precedent will result, creating a slippery slope for agencies

to abuse their power and discretion by re-writing laws that clearly and unambiguously set forth the intent of Congress. Consequently, Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari should be granted.[2]

Respectfully submitted,

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Attorneys for Respondent, Aircraft Owners and Pilots Association

[2] Respondent Aircraft Owners and Pilots Association supports the Petition for Writ of Certiorari filed by Friends of Richards-Gebaur Airport and the arguments contained therein under Sup. Ct. R. 12.6. Respondent submits further grounds for granting the petition based on arguments presented to the Eighth Circuit in the same proceeding below. These arguments, however, are based on another part of the FAA's final decision, separate statutory authority, a separate regulation, and a separate internal agency order.

No. 01-949

In The
Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

TITLE 49 – Transportation
SUBTITLE VII – Aviation Programs
PART B – Airport Development and Noise
CHAPTER 471 –Airport Development
SUBCHAPTER II – Surplus Property for Public Airports

Sec. 47153. - Waiving and adding terms

(a) GENERAL AUTHORITY. -

(1) The Secretary of Transportation may waive, without charge, a term of a gift of an interest in property under this subchapter if the Secretary decides that -

(A) the property no longer serves the purpose for which it was given; or

(B) the waiver will not prevent carrying out the purpose for which the gift was made and is necessary to advance the civil aviation interests of the United States.

(2) The Secretary of Transportation shall waive a term under paragraph (1) of this subsection on terms the Secretary considers necessary to protect or advance the civil aviation interests of the United States.

(b) WAIVERS AND INCLUSION OF ADDITIONAL TERMS ON REQUEST. -

On request of the Secretary of Transportation or the Secretary of a military department, a department, agency, or instrumentality of the executive branch of the United States Government or a wholly owned Government corporation may waive a term required by section 47152 of this title or add another term if the appropriate Secretary decides it is necessary to protect or advance the interests of the United States in civil aviation or for national defense.

14 C.F.R. - CHAPTER I - PART 155

§ 155.3 Applicable law.

(a) Section 4 of the Act of October 1, 1949 (63 Stat. 700) authorizes the Administrator to grant the releases described in § 155.1, if he determines that --

(1) The property to which the release relates no longer serves the purpose for which it was made subject to the terms, conditions, reservations, or restrictions concerned; or

(2) The release will not prevent accomplishing the purpose for which the property was made subject to the terms, conditions, reservations, or restrictions, and is necessary to protect or advance the interests of the United States in civil aviation. In addition, section 4 of that Act authorizes the Administrator to grant the releases subject to terms and conditions that he considers necessary to protect or advance the interests of the United States in civil aviation.

(b) Section 2 of the Act of October 1, 1949 (63 Stat. 700) provides that the restrictions against using structures for industrial purposes in any instrument of disposal issued under section 13(g)(2)(A) of the Surplus Property Act of 1944, as amended (61 Stat. 678) are considered to be extinguished. In addition, section 2 authorizes the Administrator to issue any instruments of release or conveyance necessary to remove, of record, such a restriction, without monetary consideration to the United States.

(c) Section 68 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2098) releases, remises, and quitclaims, to persons entitled thereto, all reserved rights of the United States in radioactive minerals in instruments of disposal of public or acquired lands. In addition, section 3

of the Act of October 1, 1949 (50 U.S.C. App. 1622b) authorizes the Administrator to issue instruments that he considers necessary to correct any instrument of disposal by which surplus property was transferred to a non-Federal public agency for airport purposes or to conform the transfer to the requirements of applicable law. Based on the laws cited in this paragraph, the Administrator issues appropriate instruments of correction upon the written request of persons entitled to ownership, occupancy, or use of the lands concerned.

Order 5190.6A
AIRPORTS COMPLIANCE HANDBOOK
10/1/89

***

CHAPTER 7. RELEASE, MODIFICATION, REFORMATION OR AMENDMENT OF AIRPORTAGREEMENTS

SECTION 1. GENERAL GUIDANCE

7-1. AUTHORITY TO RELEASE, MODIFY, REFORM, OR AMEND.

a. The authority of the Administrator to release, modify, reform or amend all or part of any airport agreement and the legislative basis for such authority are discussed in Chapter 1, paragraph 5 of this Order.

b. The Administrator has delegated to regional Airports Division Managers full authority to take any action with respect to their functions and assigned responsibilities, subject only to the limitations set forth in Order 1100.5, FAA Organization-Regions and Centers, Chapter 2, Section 3.

7-2. GENERAL PRINCIPLES.

a. Within the specific authority conferred upon the Administrator by law, the FAA will, when requested, act to release, modify, reform or amend any airport agreement to the extent that such action will protect, advance, or benefit the public interest in civil aviation. Such action may involve only relief from specific limitations or covenants of an agreement or a complete and total release which authorizes a subsequent disposal of obligated airport property.

b. Any property, when described as part of an airport in an agreement with the United States or defined by an ALP, is considered to be "dedicated" or obligated for airport purposes by the terms of the agreement. If any of the

property so dedicated is not needed for present or future airport purposes, an amendment to or release from the agreement may be granted in accordance with the guidance contained in this Chapter. The omission of an airport from the NPIAS is not to be construed as a determination by the FAA that such airport has ceased to be needed for present or future airport purposes.

c. A decision to release, modify, reform, or amend an airport agreement will be based on the guidelines outlined in paragraphs 7-37a and b below and on the specific factors pertinent to the type of agreement as detailed in the following sections of this Chapter. However, any release which has the effect of permitting the abandonment, sale, or disposal of a complete airport (whether or not such action contemplates the development of a replacement airport facility) must be referred to AAS-1 for ARP-1 approval (see Order 1100.5, Chapter 2, Section 3, paragraph 222h(15)).

7-3.-7-5. RESERVED.

SECTION 2. SURPLUS PROPERTY AGREEMENTS

***

7-8. RELEASE FOR SALE OR DISPOSAL.

a. General Policy. A total release, permitting the sale and disposal of real property acquired for airport purposes under the Surplus Property Act, shall not be granted unless it can clearly be shown that the sale of such property will benefit civil aviation.

(1) If any such property is no longer needed to directly support an airport purpose or activity (including the generation of revenue for the airport), it may be released for sale or disposal upon a demonstration that such disposal will produce an equal or greater benefit (to the airport or another public airport) than the continued retention of the land. Such a release has the effect of authorizing the

conversion of a real property asset into another form of asset (cash or physical improvements) which better serves the purpose for which the real property was initially conveyed. This objective is not met unless an amount equal to the net sale proceeds based on the current FMV of the property is realized as a consequence of the release and such amount is committed to airport purposes.

(2) In cases where an airport has a large amount of revenue production property that has remained undeveloped due to the lack of demand for this kind of property and where there appears to be no prospect for future development, FAA should fully evaluate the merits of either reversion or complete release for sale. This must be coordinated with AAS-300.

***

SECTION 5. PROCEDURES

7-37. FAA ACTION ON OWNER REQUESTS.

a. Evaluation. When a request has been received, supported by the appropriate documentation and exhibits, an evaluation of the total effect of the owner's proposal shall be made. This evaluation shall be based on the general policy stated in paragraph 7-2 and shall include consideration of pertinent factors such as:

(1) The past and present owner's compliance record under all its airport agreements and its actions to make available a safe and usable airport for maximum aeronautical use by the public; and evidence that the owner has taken or agreed to take all actions possible to correct noncompliance situations at the airport, if applicable.

(2) The reasonableness and practicality of the owner's request in terms of aeronautical facilities which are needed and the priority of the need.

(3) The net benefit to be derived by civil aviation and the compatibility of the proposal with the needs of civil aviation.

(4) Consistency with the guidelines for specific types of releases as discussed in this Chapter.

b. Determinations. The FAA will not release more than that which the owner requests. The decision to grant or deny the request, based on the above evaluation factors, must be guided by the statutes, regulations and policy applicable to the specific types of agreements involved. In addition, it must be determined if an environmental assessment is required under Order 5050.4, Airport Environmental Handbook. Further, it must be determined that either:

(1) The public purpose for which a term, condition, or covenant of an agreement, or the agreement itself, was intended to serve is no longer applicable, or

(2) The release, modification, reformation or amendment of an applicable agreement will not prevent accomplishment of the public purposes for which the airport or its facilities were obligated, and such action is necessary to protect or advance the interest of the United States in civil aviation, or

(3) The release, modification, reformation or amendment will obligate the airport owner under new terms, conditions, covenants, reservations or restrictions determined necessary in the public interest and to advance the interests of the United States in civil aviation, or

(4) The release, modification, reformation or amendment will conform the rights and obligations of the owner to the statutes of the United States and the intent of the Congress consistent with applicable law.

***

[DATE STAMPED DEC 29 1999]
[LOGO]

U.S. Department
of Transportation

Federal Aviation
Administration

Office of the Associate
Administrator for Airports

800 Independence Avenue, S.W.
Washington, D.C. 20591

[DATE STAMPED DEC 23 1999]

Mr. Russell Widmar
Director of Aviation
City of Kansas City, Missouri
601 Brasilia Avenue
Kansas City, MO 64153

Dear Mr. Widmar:

Re: Richards-Gebaur Memorial Airport
Release of Certain Federal Obligations

In letters dated September 26, 1997, December 5, 1997, and December 21, 1999, the City of Kansas City, Missouri, requested that the Federal Aviation Administration (FAA) release the City from its obligations under the Surplus Property Act of 1944 to maintain the surplus property constituting certain parcels at the Richards-Gebaur Memorial Airport for aeronautical use, and from its obligations under Federal grant agreements to make the airport available to the public for aeronautical use.

The requested release would enable the City to close the Richards-Gebaur Memorial Airport in order to use the subject parcels, which comprise airfield and landside portions of the existing airport, as non-aeronautical, revenue-producing airport property of the Kansas City Aviation Department. Specifically, the two parcels would be used as an intermodal railport facility and related activities. The subject parcels are identified as Phase 1 and Phase 2 parcels in draft leases of the property, dated November 18, 1999, from the City to the Kansas City Port Authority and from the Kansas City Port Authority to the Kansas City Southern Railroad respectively, and a draft development agreement dated November 8, 1999.

In a Memorandum of Agreement (MOA) dated July 14, 1998, the City and the FAA agreed on the conditions required for a release of the Richards-Gebaur property on terms that represented a net benefit to civil aviation in the Kansas City region. (Attachment 1). The terms of the proposed leases of property to the Kansas City Port Authority and the Kansas City Southern Railroad submitted to the FAA on November 15 were substantially revised from earlier drafts in order to meet the requirements of the MOA.

In a letter to FAA Administrator Jane Garvey dated August 6, 1999, Mayor Kay Barnes advised the FAA of the City's intent to proceed with planning for a new replacement general aviation airport on or in the vicinity of the Richards-Gebaur site, and to make every effort to achieve this goal. In consideration of the changed circumstances involved in the potential development of a replacement airfield, the FAA and the City negotiated an Amended and Restated Memorandum of Agreement (Amended MOA) to reflect the terms that would apply during the planning for a replacement airport. The FAA and the City have agreed to the terms and provisions stated in the Amended MOA

attached to this Release. (Attachment 2). The Amended MOA will be executed only after a City Council ordinance approving the document has been adopted and has taken effect. The City has assured the FAA that the Amended MOA will be submitted for City Council approval at the next formal meeting of the City Council following the issuance of this Release.

By letter of December 18, 1999, the FAA advised the City that the terms of the draft leases dated November 15 and the development agreement dated November 8 were consistent with the Amended MOA, subject to confirmation that the City agreed with certain specific interpretations of the City's obligations under the leases. In a letter dated December 17, counsel for the City affirmed the City's concurrence with the FAA's interpretation of the leases and development agreement. (Attachment 3). The 1998 MOA is essentially identical to the Amended MOA with respect to requirements for the lease of parcels of the Richards-Gebaur property, and the leases are, therefore, also consistent with the 1998 MOA.

By letter dated December 21, 1999 (Attachment 4), the City requested that the FAA issue the release of the airport effective January 1, 2000, based on the July 1998 MOA and in advance of the execution of the Amended MOA. The City made this request based on its interest in leasing the airport property to the Kansas City Southern Railroad on January 1 to meet certain construction and occupancy goals for the planned development of the Phase 1 and Phase 2 parcels. In recognition that the FAA and the City had negotiated amendments to the MOA that had not yet been executed, the City made certain commitments in this letter regarding approval and execution of the Amended MOA and the City's efforts to proceed with planning for a new airport on the Richards-Gebaur site.

In summary, as of the date of this most recent request from the City, there is an MOA in effect between the FAA and the City for the terms of a release of the Richards-Gebaur property, and the FAA has determined that the City's proposed lease of the property is consistent with the terms of this MOA. While the City has committed to proceeding with approval of the Amended MOA, and the FAA expects the City to fulfill this commitment, there is no legal impediment to issuance of a release at this time.

Accordingly, subject to the conditions, reservations, and stipulations contained in Attachments 1, 3, and 4, the City is hereby released from its obligations to maintain the Richards-Gebaur Memorial Airport property for aeronautical use. The property remains part of the Kansas City Airports System owned and operated by the Kansas City Department of Aviation, and remains subject to the obligations of the Surplus Property Act of 1944 and Federal grant agreements to the extent those obligations do not require that the property be used as a public use airport. The release does not preclude reclassification of the property, other than the Phase 1 and Phase 2 parcels described above, for aeronautical use if the City requires the property for a replacement general aviation airport on the site.

Sincerely,

/s/ Paul L. Galis
for: Louise E. Maillett
Acting Administrator
for Airports

Enclosures

(3)

Supreme Court, U.S.
FILED
FEB 4 2002

No. 01-949

IN THE

Supreme Court of the United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION, JANE GARVEY, ADMINISTRATOR; CITY OF KANSAS CITY, MISSOURI; THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF THE CITY OF KANSAS CITY, MISSOURI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit erred in affirming the Federal Aviation Administration's ("FAA") factual determination that there were no "extraordinary circumstances" requiring the preparation of a formal environmental assessment for the otherwise categorically excluded release of Richards-Gebaur Memorial Airport from federal obligations to permit non-aeronautical uses, and rejecting Petitioner's claim that the FAA's decision was arbitrary and capricious.

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No. 01-949

IN THE

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FRIENDS OF RICHARDS-GEBAUR,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, JANE GARVEY, ADMINISTRATOR; CITY OF KANSAS CITY, MISSOURI; THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondents.

BRIEF IN OPPOSITION OF THE CITY OF KANSAS CITY

COUNTERSTATEMENT OF THE CASE

The Court of Appeals for the Eighth Circuit correctly denied the petitions for review filed by the three petitioners below,[1] and affirmed the decision of the Federal Aviation Administration ("FAA") (1) finding no extraordinary circumstances requiring the preparation of a formal environmental assessment for the otherwise categorically excluded release of the City of Kansas City ("the City" or "Kansas City") from its federal obligations to maintain Richards-Gebaur Memorial Airport for aeronautical use, and, (2) releasing Kansas City from such obligations. *Friends of*

[1] Friends of Richards-Gebaur Airport ("Friends"), the City of Grandview, Missouri ("Grandview"), and the Aircraft Owners and Pilots Association ("AOPA").

Richards-Gebaur Airport v. FAA, 251 F.3d 1178 (8th Cir. 2001) (Pet. App. at 2).

The facts leading to the court of appeals' decision are as follows. The Richards-Gebaur Memorial Airport ("RG" or "the Airport") was built in 1941 on land owned by Kansas City. In 1955, the City deeded the property free of charge to the United States Air Force with the express understanding that the facility would be used as a permanent military base. In 1976, the Air Force deactivated the military base, declaring 1,360 acres to be surplus property. In August 1985, the Air Force conveyed the property back to Kansas City, pursuant to the Surplus Property Act of 1944, 49 U.S.C. § 47151, *et seq.*, for use as a public airport, and thereafter the Airport was used as a general aviation airport facility by Kansas City.

The Airport consistently lost money, experiencing losses exceeding $18 million between 1983 and 1997, with continuing losses projected at more than $1.5 million per year. In 1997, the City filed an application with the FAA seeking permission to close RG and to be released from federal obligations requiring the City to maintain the property for aeronautical use, thus allowing the City to redevelop the land into a new intermodal rail-truck freight distribution center. On July 14, 1998, the City and the FAA entered into a Memorandum of Agreement ("MOA") setting forth the terms and conditions pursuant to which the City would be released from its federal obligations and the Airport would be closed and redeveloped for non-aeronautical purposes, subject to the grant of the City's application for release from applicable federal obligations. The FAA stated in the MOA that the release and closure of the Airport would result in a net benefit to aviation. In addition, the MOA imposed obligations on the City to reimburse the FAA $5 million (representing the unamortized value of federal grants previously received by the City for airport projects), and imposed conditions requiring the City to use net proceeds realized from the disposition of the property for aviation-related purposes for 20 years from the date of the FAA's release.

On February 22, 1999, the City Council of Kansas City by ordinance approved a 50-year lease for the development of the facility by Kansas City Southern Railway Company. On October 22, 1999, the City submitted to FAA an extensive Environmental Documentation Report demonstrating that the closure of RG and conversion into an intermodal facility would not present any "extraordinary circumstances" that would require the preparation of an environmental assessment under the FAA's Airport Environmental Handbook (FAA Order 5050.4A). On December 23, 1999, the FAA issued a decision releasing Kansas City from its federal obligations to maintain the property for aeronautical use, and determining that the closure was categorically excluded from the requirement to prepare an environmental assessment because there were no "extraordinary circumstances" that would override the presumptive categorical exclusion under FAA rules.

Throughout the more than two years that the City's application was pending before the FAA, the public (including each of the petitioners below) had a full opportunity to participate in and comment on the City's application and on the proposed redevelopment process. Thirty-five public meetings were held in various community venues, in addition to open public meetings on the proposal before the City Council of Kansas City. One of the petitioners below, AOPA, submitted two letters to the FAA expressing various concerns about the closure, neither of which raised environmental issues. No federal, state or local governmental agency opposed the RG closure and redevelopment. Indeed, both the Missouri Department of Transportation and the Mid-America Regional Council (Kansas City's metropolitan planning organization) found the intermodal facility consistent with regional traffic and air quality considerations. The City of Belton, Missouri, the municipality located closest to the airport, supported the intermodal facility. It was not until the very day that the FAA issued its decision that the City of Grandview (which did not file a certiorari petition) faxed the FAA a brief letter asking it

to deny a categorical exclusion but submitted no analysis and no documentation to support its belated request.

Petitions for judicial review of the FAA's decision were filed by Friends, Grandview and AOPA. Friends and Grandview challenged the FAA's decision to categorically exclude the closure from the requirement to prepare an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(d) (1994). AOPA challenged the FAA's decision to grant Kansas City a release from its federal obligations.

The Court of Appeals for the Eighth Circuit denied the petitions and affirmed the FAA's determinations. Petitions for rehearing and for rehearing en banc were denied by the Court of Appeals on September 19, 2001.

A Petition for Writ of Certiorari was filed only by Friends. The two other petitioners below, including Grandview (the only governmental petitioner below), did not join in this Petition.[2]

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[2] AOPA did not file a Petition for Writ of Certiorari, but filed a Brief in response to Friends' Petition.

ARGUMENT IN OPPOSITION TO PETITION

The Petition for Writ of Certiorari challenges only one component of the Eighth Circuit's decision: the decision affirming the FAA's determination that there were no "extraordinary circumstances" requiring the preparation of an environmental assessment. The Petition is without merit and should be denied.[3] There are no important federal questions and no conflicts between circuit court decisions that need to be resolved by this Court.

The case below involved nothing more than an unexceptional judicial challenge to a decision by a federal agency, the FAA, exercising the discretion afforded to it by statute and utilizing its unique subject matter expertise. The court of appeals' thorough and well-reasoned decision applied well-settled standards of review to determine whether the FAA's decision was arbitrary and capricious. The court of appeals correctly concluded, on the particular facts of the case, that the FAA had reasonably exercised its discretion in determining that there were no "extraordinary circumstances" that would require an environmental assessment for the closure of the Airport. The Eighth Circuit's fact-specific decision does not implicate any legal or policy issue worthy of review by this Court, and Friends' Petition should receive the same result as the petitioners' below unsuccessful

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[3] As noted above, AOPA did not file a Petition for Writ of Certiorari. However, AOPA's brief to this Court in support of Friends' Petition does not even mention the environmental issues raised by Friends, but rather focuses solely on the court of appeals' other ruling that the FAA's decision to release the City from its federal obligations was not arbitrary, capricious, and contrary to law. Friends' Petition did not challenge that decision of the court of appeals. Having failed to file its own timely petition, AOPA cannot now present issues on the legality of the FAA's decision through the guise of a Brief in support of Friends' Petition. In any event, AOPA's position directly contravenes the Petitioner's. Friends argues that the Eighth Circuit did not give FAA's Handbook enough deference, while AOPA asserts that the Eighth Circuit gave the FAA too much deference. Both are wrong.

challenges (including the unsuccessful requests for en banc review) to the court of appeals.

A. There Is No Conflict Between Circuits

Petitioner attempts to manufacture a conflict between the Eighth Circuit's decision below and the Seventh Circuit's decision in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), with respect to the standard of deference to be given to agency orders established pursuant to NEPA. Petitioner erroneously claims that "had the Eighth Circuit ruled consistently with the Seventh Circuit, the FAA's granting of a categorical exclusion would have been reversed." Pet. at 19. Petitioner blithely ignores the significant substantive differences between this case and *Rhodes*, and boldly misrepresents the Eighth Circuit's holding with respect to the deference issue.

First, *Rhodes* is not applicable here. *Rhodes* involved a case in which the federal agency, in that case the U.S. Forest Service, acknowledged that there were at least two "undisputed 'extraordinary circumstances'", but then determined that those extraordinary circumstances would not have a significant impact on the environment without performing an environmental assessment. Thus, the Seventh Circuit found:

> The Defendant [U.S. Forest Service] concedes that at least these two extraordinary circumstances are present . . . thus, there is no dispute that the proposed actions here are categorical exclusions but that there are also present at least two extraordinary circumstances that 'may have a significant environmental effect.'

153 F.3d at 789.

Unlike *Rhodes*, the instant case did not involve a finding by the FAA that there were any "extraordinary circumstances." Indeed, to the contrary, the FAA determined

that there were no extraordinary circumstances, and the court of appeals simply affirmed that factual determination.

This Court does not grant petitions for writ of certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") The question of whether there exists extraordinary circumstances is one of fact and the inferences to be drawn from the facts. Accordingly, this case does not present a matter that warrants Supreme Court review.

Second, *Rhodes* is also inapposite because, unlike the FAA Handbook, the U.S. Forest Service Handbook was promulgated by notice and comment (*i.e.*, the normal rulemaking process) and was thus treated by the Seventh Circuit as a "regulation" entitled to full *Chevron* deference. *See Rhodes*, 153 F.3d at 789; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). By contrast, the FAA's Environmental Handbook was not subject to notice and comment. Therefore, under this Court's holdings in *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000), the Handbook is not entitled to *Chevron* deference but rather to respect in accordance with its power to persuade.

Moreover, Petitioner mischaracterizes the Eighth Circuit's standard of review. Contrary to Petitioner's claim, the Eighth Circuit did not disregard or deviate from the FAA Environmental Handbook. Rather, the Eighth Circuit carefully and thoroughly followed the FAA Handbook and reviewed the FAA's actions in light of each and every specific element set forth in the Handbook with respect to the existence or lack of existence of extraordinary circumstances, and thoroughly explained its reasons for affirming the FAA's decision that no such extraordinary circumstances were present. Thus, the Eighth Circuit concluded:

> The FAA documented its categorical exclusion evaluation in this case in which it considered and discussed the relevant extraordinary circumstances listed in FAA Order 5050.4A. . . . The FAA concluded that based upon its evaluation of the likely impacts of the proposed action, no extraordinary circumstances existed to preclude a categorical exclusion of this action from the environmental assessment requirement.

Friends, 251 F.3d at 1186 (Pet. App. at 11-12).

Third, since *Rhodes* was decided before the *Christensen* and *Mead* decisions, even if the underlying factual and legal circumstances in *Rhodes* and the instant case were similar (which they are not), there could be no "conflict" between the pre-*Christensen/Mead* Seventh Circuit decision and a post-*Christensen/Mead* Eighth Circuit decision.

Finally, given the Eighth Circuit's thorough analysis of the consistency of the FAA's actions with the requirements of the FAA Environmental Handbook, the outcome would have been the same whether *Chevron* deference or *Christensen* deference were applied.

B. There Are No Other Bases For Supreme Court Review

Having dispensed with the alleged deference and circuit conflict issues, there are no other bases for certiorari. The Petition represents nothing more than sour grapes disagreement with the judgment of the Eighth Circuit that the FAA's decision was neither arbitrary nor capricious. Petitioner merely repeats arguments that were made to and rejected by the Eighth Circuit not once, but twice.

Petitioner claims that the projected level of carbon monoxide (CO) emissions from the intermodal project for the year 2018 "violates state standards", and therefore constitutes an extraordinary circumstance. Pet. at 15. That assertion is completely erroneous. First, there is no case law or regulatory

guidance addressing what level of emissions, occurring at what point in time, should be considered "significant" for purposes of requiring an environmental assessment. Second, Kansas City is classified as an "attainment area" for CO. As a consequence, the conformity regulations (which establish that emissions of 100 tons or less are considered "de minimus") do not apply to ***any*** CO emissions in the Kansas City area. *See Environmental Def. Fund Inc. v. EPA*, 82 F.3d 451, 454 n.2 (D.C. Cir. 1996) (explaining that Congress restricted "conformity" applicability to "non-attainment" and "maintenance" areas). Thus, the alleged 100-ton threshold does not apply to the intermodal facility. Third, even if Kansas City were classified as "maintenance" for CO emissions (which it is not), the FAA's "worst-case projection" indicates emissions slightly exceeding 100 tons of CO emissions in the eighteenth year, far too low and remote in time to trigger any concern; certainly not enough to constitute a "violation" of any state or federal law or establish a "significant" environmental impact.

This same argument was made by the Petitioner to the Eighth Circuit and properly rejected by that court: "The new calculations provided by the FAA continue to indicate that the air quality effects of the new facility do not rise to a significant level." *Friends*, 251 F.3d at 1191 (Pet. App. at 22). This issue involves a question of fact, which the FAA resolved and the court of appeals affirmed. As stated above, a writ of certiorari is not appropriate merely to "review the evidence or inferences drawn from it." *General Talking Pictures Corp.*, 304 U.S. at 178.

Petitioner next claims that Grandview's tardy and superficial submission to the FAA constituted an "extraordinary circumstance" demonstrating that the project was "highly controversial on environmental grounds." There is no basis for this Court to review the Eighth Circuit's conclusion that Grandview's "thirteenth-hour" letter faxed on the very day of the FAA's decision was, in the words of the court of appeals: "too little, and far too late in a public

proceeding that had been ongoing for approximately 2 years." *Friends*, 251 F.3d at 1187 (Pet. App. at 13). It is highly significant that Grandview itself has not sought review in this Court.

Finally, Petitioner asserts that the FAA failed to apply an interdisciplinary approach because it failed to examine and consider the construction of railroad tracks for the intermodal facility as part of its evaluation. This assertion also is without merit, as the Eighth Circuit properly concluded. The court of appeals found that "the FAA did not categorically exclude the construction of a railroad track," but rather

> The FAA properly considered the potential environmental impact that might result from the proposed facility. Whether the construction of track is considered a railroad line subject to the jurisdiction of the Surface Transportation Board (STB), . . . or an industrial, team, switching, or side track that is not within STB's jurisdiction . . . is a matter to be considered in the first instance by the STB. We agree with the FAA that this question is not properly before us at this time. It is enough that the FAA considered the relevant resulting environmental factors and determined them to have no significant impact on the environment.

Id. at 1192-1193 (Pet. App. at 25).

Both the FAA and the Eighth Circuit were correct. The FAA was not only not required to consider the effect of future track construction, it had no jurisdiction to do so. If future track construction involved railroad lines, the Surface Transportation Board would have exclusive, preemptive jurisdiction (under 49 U.S.C. § 10901) with respect to such matters, and only the STB would have the authority to determine whether an environmental assessment or an environmental impact statement would be required under its regulations. To the extent that the future track involved a spur, industrial, team, switching, or side track, then under 49

U.S.C. § 10906, STB has no authority to approve, disapprove, license or otherwise regulate such construction, and there would be no "major federal action" with respect to such construction for NEPA purposes. The FAA has neither the jurisdiction nor authority over construction of rail lines of any nature, and therefore was not required or even permitted to assess the environmental impact of track construction at the intermodal facility, as the Eighth Circuit correctly concluded.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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No. 01-949

In The
Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,
v.
FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION

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REPLY BRIEF FOR RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION

The brief in opposition filed by the City of Kansas City, Missouri, in summarily dismissing the brief of Respondent Aircraft Owners and Pilots Association (AOPA), misunderstands both the rules and precedent of this Court, and errs in concluding that Respondent's brief is in direct contravention of Petitioner's. Additionally, we note that Respondent City of Kansas City inappropriately summarizes Respondent AOPA's position to this Court by distilling its arguments down to one issue, i.e., deference. Respondent AOPA's brief includes additional reasons to find error in the Eighth Circuit's decision, including the FAA's failure to follow the plain language of the underlying statute.

I. A Party-Respondent May Raise Any Issue Raised Before The Court Below

Under Sup. Ct. R. 12.6, any parties that appeared in the proceeding below are considered parties entitled to file documents before the Supreme Court. A party may choose not to file a petition for writ of certiorari themselves, but may then support their cause by filing a brief in support of a petition for writ of certiorari. Respondent AOPA is thus a party to the proceeding before this Court by virtue of its participation before the Eighth Circuit and Petitioner's filing. As such, it is entitled to make filings in the instant proceeding and raise *any* issues that were raised immediately below.

In O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), the Supreme Court held that when a party to the proceeding below files a petition for certiorari, all other parties below are automatically joined as respondents. Thus, when the Director of the Pennsylvania Department of Public Welfare (DPW) filed a petition for writ of certiorari

before the Supreme Court, the Secretary of the Department of Health, Education, and Welfare (HEW), was an automatic respondent because he was a party to the proceedings below. The court held that "[i]n that capacity, [the Secretary] may seek reversal of the judgment of the Court of Appeals *on any ground* urged in that court." Id. at 783-784 n. 14 (emphasis added).

Three years later, the Court affirmed the principle set forth in O'Bannon. See Director v. Perini North River Associates, 459 U.S. 297, 304 (1983). The petitioner before the Court, the Director of the office of Workers' Compensation Programs (OWCP), was a respondent who filed a brief in support of Churchill in the Second Circuit. Churchill was the petitioner below. He opted not to file a petition before the Supreme Court. When the Director of the Office of Workers' Compensation Programs filed its petition, Churchill was automatically joined as a respondent. In that capacity, Churchill was entitled to "seek reversal of the judgment of the Court of Appeals *on any ground* urged in that court." Id. (quoting O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783-784 FN 14(1980)) (emphasis added).

In the instant case, Friends of Richards-Gebaur Memorial Airport filed a petition for writ of certiorari on January 4, 2002. Consequently, AOPA was automatically joined as a respondent before this Court.

As a respondent, under Sup. Ct. R. 12.6, AOPA need not file a separate petition nor join a petition to make arguments before the Supreme Court. Under O'Bannon and Perini, a respondent may raise *any* argument before the Court so long as it was raised in the proceedings below. Having made the arguments that the FAA stepped beyond its statutory authority by applying an inappropriate and incorrect standard in releasing the City of Kansas City from its obligations under the Surplus Property Act and federal

grant agreements, and that the Eighth Circuit afforded an incorrect level of deference to that decision, Respondent AOPA is entitled to raise those arguments in the instant proceeding.

II. Respondent AOPA's Position Does Not Directly Contravene That Of The Petitioner

The City of Kansas City alleges, "AOPA's position directly convenes the Petitioner's." Brief for Respondent at 5 n. 3. The City of Kansas City states "Friends argues that the Eighth Circuit did not give FAA's Handbook enough deference, while AOPA asserts that the Eighth Circuit gave the FAA too much deference. Both are wrong." Id. The City of Kansas City is plainly in error.

Petitioner Friends of Richards-Gebaur Memorial Airport makes its argument for the reversal of the Federal Aviation Administration's (FAA) decision releasing the City of Kansas City from its obligations to maintain the airport based on environmental review errors, citing FAA Orders 1050.1D and 5050.4A. Order 1050.1D was promulgated pursuant to 40 C.F.R. § 1507.3(a) of the Council on Environmental Quality regulations. Order 5050.4A is the FAA's Airport Environmental Handbook. By contrast, Respondent AOPA argues error in the FAA's decision, based on its lack of authority to make such a decision and targeting the level of deference afforded FAA Order 5190.6A. FAA Order 5190.6A is the FAA's Airport Compliance Requirements and 14 C.F.R. § 155.3 is a Federal Aviation Regulation.

Not only are different agency orders at issue, but different standards of deference and respect are also in question. Petitioner argues that Orders 5050.4A and 1050.1D are entitled to full deference because of statutory authority to promulgate such orders and engagement in the public process. Respondent AOPA argues that only

respect, if that, and not deference, is due Order 5190.6A because it was drafted solely at FAA's discretion, unilaterally, without statutory authority, and without engaging informed public participation.

Petitioner may argue that not enough deference was given Orders 5050.4A and 1050.1D while Respondent AOPA may argue that too much deference was given Order 5190.6A without contradicting each other. The parties argue based not only on different agency orders, but also on completely different statutes, regulations, and related case law and legal principles. While Petitioner and Respondent AOPA argue different grounds, each seeks the same results: (1), a determination that the FAA erred in releasing the City of Kansas City from its obligations under the Surplus Property Act and federal grant agreements, allowing the transformation of a public general aviation airport into an intermodal facility, and (2), that the Eighth Circuit acted contrary to law and precedent in upholding the FAA decision.

CONCLUSION

AOPA is an automatic respondent as a result of the Petition filed by Friends of Richards-Gebaur Memorial Airport. Under Sup. Ct. R. 12.6, AOPA may make filings in this proceeding. Under O'Bannon and Perini, AOPA may present *any* arguments made before the Eighth Circuit. Further, under O'Bannon, Respondent AOPA may go so far as to make arguments that it did not make below, so long as one of the parties below made the arguments and those arguments were addressed by the court. See O'Bannon, 447 U.S. at 783 n. 14. Finally, those arguments AOPA proffered both to the Eighth Circuit and this Court are not in direct contravention of Petitioner's. Both parties argue for the reversal of the Eighth Circuit's decision to uphold the FAA's decision to release the City of Kansas City from its federal obligations. However, each party

supports this contention by referring to the level of deference that was owed to separate, distinct FAA handbooks, versus the level of deference actually accorded.

Respectfully submitted,

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No. 01-949

In The

Supreme Court of the United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,

Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION,
JANE GARVEY, ADMINISTRATOR;
CITY OF KANSAS CITY, MISSOURI;
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF FRIENDS OF RICHARDS-GEBAUR AIRPORT

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REPLY BRIEF

Respondent, City of Kansas City, Missouri (the "City") has filed a Brief in Opposition ("Opposition") to Petitioner's Petition for Writ of Certiorari, and has raised new points which are addressed herein.

Friends and AOPA Are Not Inconsistent

The City has mistakenly stated that the Aircraft Owners and Pilots Association's ("AOPA") position directly contravenes that of Petitioner with respect to the deference to be given to the Federal Aviation Administration's ("FAA") Orders. It is important to note that the Petitioner, Friends of Richard addressed different orders, different regulations and different statutes than did the AOPA.

The Orders which are the subject of Friends's Petition are FAA Order 1050.1D and FAA Order 5050.4A. FAA Order 1050.1D was published in response to Council on Environmental Quality ("CEQ") regulation 40 C.F.R. § 1507.3(a), which required each agency to develop procedures to be published in the *Federal Register* for comment. FAA Order 5050.4 is the Environmental Handbook of the Federal Aviation Office of Airport Planning and Programming and it is consistent with the Federal Environmental procedures contained in Order 1050.1D. See 1050.D at ¶ 4f. Both FAA Order 1050.1D and Order 5050.4A contain the same categorical exclusions and extraordinary circumstances which were published pursuant to CEQ regulations and are published in the *Federal Register* for public comment and review. The FAA Orders and CEQ regulations are promulgated pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331, et seq. The Order at issue in the AOPA brief is FAA Order 5190.6A, which addressed 49 U.S.C. § 47153 relating to the transfer of surplus property for public airports. That is a totally separate statute and subject matter than NEPA. Thus, the position of the Friends and

AOPA are not in conflict and they do not contravene each other.

Grandview's Failure to Join in Petition Is Not Relevant

The City has commented that the City of Grandview did not join Friends in the Petition. Opposition at 4. The City noted that, "It is highly significant that Grandview itself has not sought review in this Court." Opposition at 10. Grandview's decision not to join in the Petition is no more relevant than the Federal Aviation Administration and Kansas City Southern Railway Company's decisions not to join the City in opposing the Petition.

Friends' Petition Presents Matters Warranting Supreme Court Review

The City contends that the issues in this case relate only to factual issues and the inferences to be drawn from those facts. That is not the situation. Friends has set forth the facts in the case that are material to consideration of the questions presented, which include issues relating to the deference that the courts are to give to the FAA Orders promulgated pursuant to CEQ regulations and published in the *Federal Register* for review and comment, and issues relating to the ability of agencies to disregard NEPA requirements to utilize interdisciplinary approaches and to consider the cumulative environmental impacts of a project when granting a categorical exclusion. All of these are proper issues for this Court. The facts were presented because they are necessary for the court's proper consideration of the questions presented. See Supreme Court Rule 14.1(g).

There is a Conflict Between Circuits

City contends there is no conflict between the circuits because in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), the U.S. Forest Service acknowledged extraordinary circumstances but then determined that those circumstances

would not have a significant impact on the environment and elected not to perform an environmental assessment, whereas in this instance the FAA and the Eighth Circuit did not find that there were any extraordinary circumstances. This is an oversimplification. In order for the FAA and the Eighth Circuit to find that there were no extraordinary circumstances, they had to disregard and violate provisions of FAA Order 1050.1D and Order 5050.4A. Both the FAA and the Eighth Circuit found facts constituting extraordinary circumstances, as defined in Order 1050.1D and 5050.4A, but dismissed them out of hand saying they were not significant. A prime example is the issue of air quality. According to the FAA Orders, it is an extraordinary circumstance if an action is likely to have a significant impact on air quality or violates a local, *state*, or federal standard for air quality, or is inconsistent with any federal, *state*, or local law or *administrative determination* relating to the environment. See FAA Order 1050.1D ¶ 32, and FAA Order 5050.4A ¶ 24. Even after correcting their initial mistakes in their Order granting a categorical exclusion, Petition App. 36, the FAA still acknowledged that carbon monoxide (CO) emissions resulting from the proposed intermodal facility in the year 2018 would be 129 tons per year. Petition App. at 52. Missouri Regulation 10 C.S.R. 10.6.020(2) provides that an emission equal to or exceeding the de minimis level of 100 tons per year of carbon monoxide is significant. This Missouri Regulation is undeniably a *state standard* for air quality and a state administrative determination related to the environment. FAA Order 1050.1D at ¶ 32f(2) and (4). See FAA Order 5050.4A ¶ 24f(2)(4). The FAA acknowledged that the carbon monoxide emissions for the year of 2018 is 29% over the de minimis level set by the state. See Petition App. 55. The City contends that the 100 ton per year threshold of carbon monoxide emissions does not apply to the intermodal facility based upon Federal law. That is not the issue. The issue is that the air quality violated state standards. The City also alleges that "emissions slightly exceeding 100 tons of CO emissions in

the eighteenth year [are], far too low and remote in time to trigger any concern." Opposition at 9. It is the FAA that initially set the term of eighteen years to evaluate the effects of this project. Further, a quantity of carbon monoxide exceeding the standard by 29% can hardly be considered only "slightly exceeding 100 tons."

Respondent Kansas City further discounts the conflict between the Seventh and Eighth Circuits on the basis that the U.S. Forest handbook was promulgated by notice and comment and was thus treated by the Seventh Circuit as a regulation entitled to full *Chevron* deference. Opposition at 7. That is the heart of an issue herein. The Eighth Circuit did not consider the categorical exclusion and extraordinary circumstances promulgated in FAA Orders 1050.1D and 5050.4A worthy of *Chevron* deference. However, the categorical exclusions and extraordinary circumstances of both the U.S. Forest Service and the FAA which were promulgated in response to 40 C.F.R. 1507.3, were published in the *Federal Register* and were subject to notice and comments. The City continues to overlook or disregard the fact that the FAA's categorical exclusions and extraordinary circumstances were developed pursuant to requirements of 14 C.F.R. 1507.3 and were, as is required by § 1507.3, adopted only after they were promulgated for notice and comment. FAA Order 5050.4A contains the same categorical exclusion and extraordinary circumstances as does FAA Order 1050.1D. See FAA Order 1050.D at ¶ 4f ("Order 5050.A . . . is consistent with federal environmental procedures contained in this order. . . . "). Thus, since as admitted by the City, the U.S. Forest Service handbook was properly given full *Chevron* deference by the Seventh Circuit and the FAA Orders herein were not given such deference, clearly there is a conflict between the United States Court of Appeals for the Eighth Circuit and the United States Court of Appeals for the Seventh Circuit, which needs resolution by this Court.

The Eight Circuit Has Decided an Important Question of Federal Law That Should Be Settled by the Supreme Court

The City argues that the FAA had neither the jurisdiction nor requirement to consider the effects of the future track construction. Opposition at 11. The future track construction is not only a possibility, it is a foregone conclusion for this major truck-rail intermodal facility. The City's and the Eighth Circuit's contention that the FAA does not have the jurisdiction or requirement to consider the cumulative effects of the track vividly demonstrates that there is a major question of national interest. The analysis of the laws and regulations by the City and the Eighth Circuit is directly contrary to the dictates of 42 U.S.C. § 4332(2)(a), which requires all agencies to "utilize a systematic, interdisciplinary approach, which will ensure the integrated use of the natural and social sciences and the environmental design art in planning and decision making which may have an impact on managing environment." Further, the process used by the FAA and accepted by the Eighth Circuit Court of Appeals violates the CEQ regulations relating to cumulative effects and use of interdisciplinary approaches. See 40 C.F.R. § 1507.2, 1508.4, 1508.7, and 49 C.F.R. 1105.6. Contrary to the assertion of the City and the FAA, there is no statutory or regulatory impediment to the FAA considering the future railroad track construction which will be built in the intermodal facility when considering their decision whether or not to grant a categorical exclusion. Whether the interdisciplinary approach and cumulative impact are to be considered in evaluating environmental impacts is an important question of federal law which must be settled by the U.S. Supreme Court because it will have a major impact for years to come on the environment and the citizens of the United States.

Respectfully submitted,

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